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No. 2203

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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Brief of Appellee

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MORSE S. DUFFIELD and  
LEWIS A. JEFFS,

Appellants,

vs.

SAN FRANCISCO CHEMI-  
CAL COMPANY, a corpora-  
tion,

Appellee.

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Upon Appeal from the United States District Court for  
the District of Idaho, Eastern Division.

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CLARK & BUDGE,  
Counsel for Appellee.

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## STATEMENT OF THE CASE.

We cannot agree to the proposition announced in appellants' statement of the case that the one controlling question here is whether the valuable mineral deposit upon which the respective locations of the parties were made can be secured by placer locations or by lode locations. As we view the law, this question is one which the court has no jurisdiction to determine, but is for the Land Department alone. The only question before this court is: Who has the right of possession of the conflict area? and the answer to this inquiry does not involve a consideration of the character of the entry by which the mineral deposit may be acquired. At the taking of testimony before the Special Examiner, it was stipulated,

“that on or about the 8th day of July, 1904, as to the Windfield, Winter, Wonder and Winslow Placer Mining Claims; that on or about the 22nd day of August, 1904, as to the Wilmington Placer Mining Claim; that on or about the 11th day of June, 1904, as to the Colecock and Inman Placer Mining Claims, and on or about the 3rd day of December, 1905, as to the Wizard Placer Mining Claim (all of which said claims are particularly described in the cross-bill herein), the predecessors in interest of the defendant, the San Francisco Chemical Company, performed all the acts required by law in respect to making a discovery upon said claims respectively, and in performing the requisite

discovery work, and in duly marking the boundaries of said placer mining claims, and each of them, and in posting notices of location, and that the location notices so posted were in due form, and that copies thereof in due form were duly recorded; also that the requisite work of at least \$100.00 per year had been performed for the benefit of placer mining claims during each calendar year since the location of said claims respectively, and that proofs in due form have been made of said work, and that said proofs have been duly recorded.”

It was further stipulated

“That on or about the 15th and 16th days of November, 1907, the complainants, Morse S. Duffield and Lewis A. Jeffs in respect to the Obey, Obed, Jintown, Fentress, Cumberland, Overton, Mount Pleasant, Arkansas, Hickman, Columbia and Wade Lode Mining claims, described in the bill of complaint herein, performed all the acts required by law in respect to making a discovery upon said claims respectively, and in performing the requisite discovery work, and in duly marking the boundaries of said lode mining claims, and each of them, and in posting notices of location, and that the location notices so posted were in due form, and that copies thereof in due form were duly recorded; also that the requisite work of at least \$100.00 per year has been performed for the benefit of said lode mining claims during each calendar year since the location of said claims respectively; and that

proofs in due form have been made of said work, and that said proofs have been duly recorded.

“Provided, however, that this stipulation is not intended to destroy the effect, if any, of any evidence now in the record, or which may hereafter be taken on behalf of the defendant as to the circumstances under which said lode locations were made, and said assessment work for the benefit of said mining claims was performed; it being the intention to stipulate only as to the performance by each party of the physical acts required by the laws of the United States and of the State of Idaho in the location of placer and lode claims respectively, and in the performance of assessment work, and in the making of proof thereof.

It was further stipulated

“That the record titles to the placer and lode claims respectively, are in the respective parties as alleged in the pleadings; that the deeds of conveyance from the predecessors in interest of the defendant of the said placer claims were made on the 28th day of August, 1906, acknowledged and delivered September 13, 1906, and recorded July 27, 1910.” (Rec., 453 and 505).

According to the evidence, the circumstances under which the lode locations were made and the assessment work performed are as follows: Appellants Duffield & Jeffs went upon the ground in controversy on the 14th day of November, 1907, and proceeded to perform discovery work, and to mark upon the ground the boundary lines of their several lode claims, and to post notices of loca-



tion. While they were engaged in this work, to-wit: on or about the 6th day of December, 1907, and prior to the recording of the notices of location for said lode claims, the employes of appellants, Colebath and Samson by name, at work on the ground (Rec., 491) and Mr. Duffield himself in the City of Montpelier, near the office of the defendant (Rec., 492) were notified by R. A. Sullivan, and W. F. Ferrier, agents of the appellee, that the ground upon which they were attempting to make locations had all been located and was the property of the defendant, and they were further forbidden to do any work upon the premises, or to remain upon the same.

Again on the 6th day of January, 1908, and prior to the recording of the notices of location of said lode claims—said notices not having been filed for record until the 17th day of January, 1908—(See Appellants' original Exhibits Nos. 2 to 12, typewritten transcript complainants' evidence, pp. 101 to 127, and stipulation filed here February 20, 1913) appellants were again notified by Mr. Sullivan that they were trespassers on the property of the defendant, and were ordered off the premises. (Rec., 489, 490).

Prior to the time appellants had made any surveys, or had made any discoveries, or had established any corners, they had full information that the premises in dispute were occupied by appellee (Rec., 150, 151, 153, 155, 175); that the lode locations which they intended to make upon the premises would be in conflict with appellee's claim to the mineral deposit of lime phosphate included within said placers. (Rec., 155, 175).

In the fall of 1908, a man named Wilcox, and others with him, employes of appellants, were by appellee forbidden to do assessment work on the lode claims, and they left the premises (Rec., 169). A suit was commenced by appellants and an order issued against the predecessors in interest of appellee (who then held the record title to the placer claims), restraining them from preventing appellants from doing assessment work and thereafter an agreement was reached between counsel for the respective parties in said suit whereby appellants, on condition that said suit be dismissed, were permitted to do assessment work for the year 1908 only (Rec., 172); that appellants when thus allowed to go upon the premises wrongfully and in violation of the agreement, remained there during the forepart of 1909 until the assessment work for that year also had been done (Rec., 175). Again in 1910 appellants were notified that they were trespassers when they attempted to do assessment work. (Rec., 168). The foregoing recital presents the facts essential to a determination of this case.

On the 11th day of August, 1910, appellee filed in the United States Land Office at Blackfoot, Idaho, its application for patent for the aforesaid placer mining claims, and on the 8th day of October, 1910, appellants filed in said land office their adverse claim against the entry of said placers. Thereafter, and within the time prescribed by law, appellants commenced this suit to quiet title as an adverse suit under Section 2326 of the Revised Statutes of the United States.

## ARGUMENT.

### *QUESTION OF WHETHER GROUND LOCATABLE AS LODE OR PLACER IS FOR LAND DEPARTMENT.*

The sole question for determination is: Who has the right of possession of the conflict area?

R. S., U. S., Sec. 2326.

Costigan on Mining Law, p. 374.

Burke vs. McDonald (Ida.), 13 Pac., 351, 353.

Clipper Mining Co. vs. Eli Mining Co., 194 U. S., 221; 48 L. Ed., 944.

Under the stipulation of the parties (Rec., 453), which recognizes the priority of appellee's locations and its compliance with the laws of the United States and of the State of Idaho with respect to making locations and the performance of assessment work, the District Court very properly rendered judgment for the appellee. (198 Fed., 942). Notwithstanding the stipulation, appellants argued that it was the duty of the court to classify these lands and determine under what form of entry the government should part with its title; this the court declined to do. To quote:

“It would seem to be thoroughly well settled, not only by the Land Department, but the courts, that the action authorized by Section 2326, R. S. (U. S. Comp. St., 1901, p. 1430), is purely possessory in character. The paramount title in the land,

the fee, resting in the government, the inquiry which is submitted by the statute to be tried as between the contending claimants in an adverse suit, no matter what the form of action adopted, which may vary in different jurisdictions, is solely as to those questions which will enable the court to say which of the contesting claimants is prior in right under the law to the present possession; that all other questions, including that of the character of the land in dispute, are committed by the statute to the Land Department as a special tribunal, which alone has authority to decide them, and whose determination is final and conclusive upon all departments of the government, including the courts."

This announcement of the law is abundantly supported by the authorities. Sec. 441, R. S., U. S., among other things, provides that the Secretary of the Interior "is charged with the supervision of public business relating to public lands, including mines." And Section 453 provides:

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government."

In explanation of the jurisdiction of the Land Department, Mr. Justice Field, in *Steel vs. St. Louis*

Smelting, etc., Co., 27 L. Ed., 226, uses the following language:

“We have often had occasion to speak of the Land Department, the object of its creation and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established, to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different Acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, *the nature of the land*, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.”

Other courts also have declared:

“The Land Department of the United States (including in that term the Secretary of the Interior, the Commissioner of the General Land Office and their subordinates), is a special tribunal vested with judicial power to hear and determine the claims of all parties to public lands, which it is



authorized to dispose of and also with power to execute its judgments by conveyances to the parties it decides are entitled to them.”

U. S. vs. Railroad Co., 67 Fed., 948.

Germania Iron Co. vs. James, 89 Fed., 811.

King vs. McAndrews, III Fed., 860.

“It is a part of the daily business of that tribunal to hear evidence and argument, and to decide who has, by purchase, by pre-emption, by location of scrip or land warrants, or by any other recognized mode, established a right to any part of the public domain. It has determined thousands of such controversies, and the title of millions of acres of land rests upon its decisions.”

(Germania Iron Co. vs. James, 89 Fed., 811.)

“The Land Department of the United States has been created as the tribunal for determining the right under the laws of the United States of any person to receive a patent for any of the public lands, and that tribunal is vested with jurisdiction *to determine all questions of fact* that may arise in any controversy respecting such right. As a necessary result therefrom the determination by this tribunal of any question of fact is conclusive upon all other tribunals, wherever such questions may be presented. The character of the land, *whether it is subject to entry under the laws invoked therefor*, the qualifications of the entryman, the extent of the

improvement or reclamation made by him, whether such improvement is a sufficient compliance with the statutory provisions for entitling him to a patent, or whether it has been made within the time prescribed by statute, or, if not, whether the reasons offered by him are sufficient to condone such failure, or any default on his part; whether he has been guilty of laches, or exercised sufficient diligence, are all questions of fact, to be submitted to and determined by the Land Department.”

Gage vs. Gunther (Cal.), 68 Pac., 710, 712.

The foregoing authorities indicate the scope of the powers of the Land Department. The court is not concerned, in an adverse suit, with the question of the classification of the land. It has no right to say whether the land is mineral or non-mineral (Wright vs. Town of Hartville (Wyo.), 81 Pac., 649), neither can it decree that either party is entitled to purchase the land in controversy from the government (Gruwell vs. Rocco (Cal.), 74 Pac., 1028). It simply passes upon the question of the *right of possession*. (Clipper Mining Co. vs. Eli Mining Co., 194 U. S., 221; 48 L. Ed., 944). In the case last cited the plaintiff in error, an applicant for patent for certain lodes, was adversely by defendant in error, a placer claimant. Prior to the commencement of the adverse suit the defendant in error had applied for patent and its application had been denied, and this decision was relied upon as a defense by the lode claimant in the adverse suit. However, it appeared that the basis of the decision was not

that the ground was not placer, but that there was not before the Department sufficient proof of its placer character. The trial court held that inasmuch as the placer claim was prior in time and had been maintained according to law, it was valid, and the placer claimant was decreed the right of possession. This decision was affirmed by the supreme court of Colorado (68 Pac., 286), and by the supreme court of the United States. (Supra). In discussing the scope of its decision determining the right of possession, the federal supreme court says:

“We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for land is settled beyond the reach of inquiry by the government, or that the judgment necessarily gives to them the lodes in controversy. In 2 Lindley on Mines, Sec. 765, the author thus states the law:

“‘Notwithstanding the judgment of the court on the question of the right of possession, it still remains for the Land Department to pass upon the sufficiency of the proofs, *to ascertain the character of the land*, and determine whether or no the conditions of the law have been complied with in good faith.’ ”

The court then quotes from an opinion by Mr. Secretary Lamar (4 Land Dec., 316), defining the effect of the decree in an adverse suit and the power of the Department with respect to the passing of title, and then continues:



“This opinion was cited as an authority by this court in *Perego vs. Dodge*, 163 U. S., 160, 41 L. Ed., 113, 118, 16 Sup. Ct. Rep., 971. See also *Aurora Lode vs. Bulger Hill and Nugget Gulch placer*, 23 Land Dec., 95, 103. The Land Office may yet decide against the validity of the lode locations, and deny all claims of the locators thereto. So, also, it may decide against the placer location, and set it aside; and in that event all rights resting upon such location will fall with it.”

After this adjudication the Clipper Mining Company made a second application for patent for its lode claims, which was resisted by the placer claimant; the latter contended that the decision of the courts awarding it the right of possession was binding upon the Land Department and was *res adjudicata* and, therefore, the department had no right to entertain the lode claimant's application. In discussing this question (Land Dec., Vol. 33, p. 660, 667), the Secretary of the Interior uses the following language:

“That the judgment of the court of competent jurisdiction pursuant to Section 2326, Revised Statutes, goes only to the question of the right of possession of a mining claim as between the parties litigant, and it remains in every case for the Land Department to determine all other questions touching the right to patent, are settled principles.”

\* \* \* \* \*

“In most of the cases in which the force and effect of these judicial awards of the right of pos-

session have been considered, the adverse suits have arisen between rival lode or rival placer claimants, and certain it is that in any such case the patent must issue to the party prevailing, if to either. The contending parties asserting titles of the same character, both claiming the ground as mineral and both relying in the one case upon the lode, and in the other upon the placer character of the land in controversy, the judgment is conclusive and binding as between them. The mutually asserted character of the land thereafter established in the proceedings before the land department, the judgment claimant, rendering due compliance with the law in all other respects, is entitled to patent; but if, on the other hand, the land prove not to be of that character, neither party may receive patent, since both stand upon the same footing in that particular. Shown by proceedings before the land department in a proper case to be agricultural, not mineral, in character, the land, *though embraced in a prior judicial reward of the right of possession* to one of two contending mineral claimants, becomes at once subject to agricultural appropriation and patent.

“In the present case, it must be kept in mind, the foundation of the title set up by respondents in their placer location. As placer claimants they adversed petitioner’s lode application, opposing their claimed placer possessory right to petitioner’s claimed lode right, and relying upon the rights arising under their placer location, if good, to defeat petitioner’s claim to the lodes, as unknown to

exist at the date of that location. The trial court found as a fact that the lodes were discovered and located, after the date of the placer location, by the grantors of petitioner; and it was solely because of the entry upon the placer location, as valid in its inception and still subsisting by reason of the continued performance of annual labor, in violation of the 'exclusive right of possession and enjoyment of all the surface included within the lines' thereof guaranteed by the statute, that the court held no rights to have arisen in the lode locators as against respondents. In other words, it was the right accruing to the latter as placer claimants which were held to have been invaded. A successful adverse claimant prevails upon the strength of his title under his own location, and is not subrogated to possessory rights under the location of his defeated adversary. Having prevailed in the adverse suit solely on the strength of their placer location, only by virtue of their right to placer patent, if any, could they take title under the judgment roll to these lodes. They could take them, if at all, only as lodes within a placer. Obviously, unless their claim is of patentable placer character the lodes are not in that situation and as such available to respondents.

“As the land department may inquire, at the instance of an agricultural protestant, or of its own motion, concerning the character of the land *therefore involved in an adverse suit and awarded to one of the parties litigant*, and dispose of the land

as the facts may be found to justify, so may it inquire here as to the placer character of the land in controversy and adjudicate rights of the claimants thereto accordingly. This is in accordance with settled principles, and is plainly pointed out by the Supreme Court of the United States, thus:

“‘We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of inquiry by the government or that the judgment necessarily gives to them the lodes in controversy.’

\* \* \* \* \*

“‘The Land Office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer location and set it aside, and in that event all rights resting upon such location will fall with it.’

\* \* \* \* \*

“‘If the land embraced in the placer location is found to be non-placer in the patentable sense, so that respondents cannot take title to the lodes in question in connection therewith, the basis of their claim to the lodes disappears, no prejudice to the claim of petitioner can have resulted from the judgment, and no obstruction to the completion of the latter’s patent proceedings, if in themselves regular, would then remain. Indeed, to hold otherwise would be to deny patent to both parties. Nearly ten years elapsed between the date of the hearing which re-

sulted in the rejection of the placer application and the date of the application for lode patent. What placer development may have occurred in the interval remains to be determined, for as of the latter date petitioner's rights are to be determined. Petitioner points out, as conclusive, the following admission in respondent's brief:

“ ‘Now, there is no dispute as to the present character of the ground here involved. It is admittedly lode.’

“ ‘If this could be taken as an unequivocal admission of the non-placer character of the land embraced in the placer location as of the date last mentioned, the case would seem to be relieved of further question. It cannot, however, be so taken.’ ”

This case seems to entirely cover in principle the case at bar. A petition for review was filed and in Vol. 34, at page 401 of the Land Decisions, the Secretary again expressed in a very well considered opinion these same views. To quote:

“ ‘Commenting upon the doctrine of rights arising under a valid location, as applied by the several courts in this case, counsel for respondents sum up the situation presented here, in the following clear and concise statement contained in their brief:

“ ‘The effect of this judgment, thus affirmed, under the clear language of Section 2326, leaves to the adverse claimants as the successful litigants the privilege of appearing with this judgment roll in the United States Land Department and making



thereon the statutory proof and payment and receiving patent.'

"The soundness of this conclusion the Department readily affirms. But the conclusion suggests in itself the pertinent question: What proof would be required? And in answer, *Proof of the patentably placer character of respondents' claim* must be included. Should that proof fail, respondents' rights under their judgment roll would fail."

The decisions of the department are in exact accord with the decision in said case by the Supreme Court of the United States. The department has all along assumed to pass upon and has determined the question of the character of land, whether subject to entry as agricultural land or as lode or as placer. Following are a few of such decisions:

H. J. Bennett, Jr., 3 Land Dec., 116.

McGleen vs. Wienbroeer, 15 L. Dec., 370.

Shepherd vs. Bird, 17 L. Dec., 82.

Alice Placer Mine, 4 L. Dec., 314.

Henderson vs. Fulton, 35 L. Dec., 652.

Gary vs. Todd, 18 L. Dec., 58.

Florida Cent., etc., R. R. Co., 26 L. Dec., 600.

Roy McDonald et al., 40 L. Dec., 7.

Utah Onyx Dev. Co., 38 L. Dec., 504.

In the case of Alice Placer Mine, above cited (the opinion in which was cited with approval by the United States Supreme Court in the Clipper Mining Company case), the court in the adverse suit had decided the right

of possession to be in the placer claimant, but the Commissioner of the General Land Office thereafter directed a hearing to determine the character of the land. Mr. Secretary Lamar in sustaining the action of the Commissioner, says:

“The question to be determined under said application is, whether or not you had the authority under the law to direct a hearing after judgment of the court favorable to applicant. I am asked to say that you have not such authority—that at such a stage of proceedings the law is mandatory, and that your remaining duties under Section 2326 of the Revised Statutes are merely the ministerial acts of preparing and issuing the patent. I am unable to assent to this proposition.

“It is too well settled to need discussion that until the issue of patent, title to the public land is in the United States, and that while so, and subject to disposal, the Land Department must, under the law, be the judge as to when, under what circumstances and how the Government shall part with title (*Moore vs. Robbins*, 96 U. S., 530). Not only must the character of the land be considered, but the law specified that certain prerequisite qualifications must exist and be found in the applicant for title. Certain precedent acts are also necessary. The law imposes upon the Land Department the duty of passing upon these various prerequisites, and determining when they have been met.

“This being true, can it be supposed that the intent of the law in such cases is to require the

issue of patent by the officer specially charged with the duty of disposing of the public lands under the law, before that officer is satisfied that the requirements of law have in good faith been complied with by the applicant? Can the Commissioner of the General Land Office be compelled to act upon the judgment of another in opposition to his own judgment in a case for the proper disposition of which the law holds him responsible, subject to the direction of the appellate or supervisory authority placed over him by the law itself?

“Does the judgment of the court as to which of two litigants has the better title to a piece of land bind the Commissioner to say, without judgment, or contrary to his judgment, that the successful litigant has complete title and is entitled to patent under the law? The usual result following a favorable judgment in a court under Section 2326 of the Revised Statutes is, I doubt not, the issue of patent in due time, but in such case the final passing of title is not on the judgment of the court independent of that of the Commissioner, but is on the judgment of the latter pursuant to that of the former, and on certain evidence supplemental to that furnished by the judgment roll.

“The judgment of the court is, in the language of the law, ‘to determine the question of the right of possession.’ It does not go beyond that. When it has determined which of the parties litigant is



entitled to possession, its office is ended, but title to patent is not yet established.

“The party thus placed in possession may ‘file a certified copy of the judgment roll with the register and receiver.’ But this is not all. He may file ‘the certificate of the surveyor general that the requisite amount of labor has been performed or improvements made thereon.’ Why file this, or anything further, if the judgment roll settles all questions as to title and right to patent? Clearly, because the law vests in the Commissioner the authority and makes it his duty to see that the requirements of law relative to entries and granting of patents thereunder shall have been complied with before the issue of patent. His judgment should, therefore, be satisfied before he is called upon to take final action in any case. In this case, the judgment of the court ended the contest between the parties and determined the right of possession. The judgment roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent. (*Branagan et al. vs. Dulaney*, 2 L. D., 744). The sufficiency of that proof is a matter for the determination of the Land Department. It follows, therefore, that further hearing may, if deemed necessary, be ordered for the purpose of ascertaining with greater certainty the character of the land, or whether the conditions of the law have been complied with in good faith. To hold differently and to say that after the presentation of the judgment roll nothing

remains for the Commissioner save the ministerial acts of preparing and issuing patent, would be to say that the Land Department loses all jurisdiction in a case after commencement of suit by an adverse claimant. I am well satisfied that the law contemplates no such condition of affairs.

“The application is denied.”

Any determination by the court as to whether the ground is lode or placer would be of no binding force. As an expression of the opinion of this court it would, of course, be given due consideration, but as stated by Secretary Lamar, the Department would have a right to make a further inquiry, and if it may make further inquiry and ignore the court's conclusion as to the proper form of entry for the acquisition of the land in question, of what efficacy is the adjudication of the court? Even if the Land Department should agree with the court's conclusion as to the proper form of entry for phosphate lands, the fact that the determination of that question is ultimately with that department independently of the court's finding, would make such finding at best merely advisory, and courts are not established to render advisory decrees. If the Land Department may itself finally determine whether the land is patentable as lode or as placer, then jurisdiction as to that question is with it. “The test of jurisdiction is not right decision, but the right to enter upon the inquiry and make some decision.” (King vs. McAndrews, 111 Fed., 860). And inasmuch as the classification of the land is a matter connected with the determination of how title shall pass from the government rather than

with an ascertainment of who is entitled to possession, the Land Department certainly has jurisdiction to make such classification. Should the Department, after the court has awarded right of possession to the placer claimant, determine from an independent investigation that the land is non-placer in character, appellants might then proceed to perfect their proceedings for patent under their lode locations. As stated by the Honorable Secretary of the Interior in the Clipper Mining Company case (33 L. Dec., 660, 667):

“If the land embraced in the placer location is found to be non-placer in a patentable sense, so that respondents cannot take title to the lodes in question in connection therewith, the basis of their claim to the lodes disappears, no prejudice to the claim of petitioner can have resulted from the judgment, and no obstruction to the completion of the latter’s patent proceedings, if in themselves regular, would remain. Indeed, to hold otherwise would be to deny patent to both parties.”

It may be argued that should this court award possession to appellants on the basis that the land is only locatable as lode and the Land Department should thereafter hold the land to be placer, appellee might then, under the law as above announced, proceed to perfect its patent proceedings, but to this suggestion we reply that it is not the province of the court to determine the only question upon which appellants rely to deprive appellee of the right of possession. If appellee must lose its claims notwithstanding it is prior in time and has com-

plied with all requirements in maintaining them, it should be because of a classification of the lands made by the tribunal established by law for that purpose and not because of a classification by the court. The court should award appellee right of possession no matter what the Land Department may hereafter do in the exercise of its powers. Whichever party prevails in the contest concerning the character of the land and the form of entry, let him prevail by virtue of the determination of those questions by the proper tribunal. Counsel may say that the Land Department has lately decided in the Harry lode case that phosphate rock is locatable as lode. It did so decide so far as that claim was concerned (which, by the way, supports our contention that it is the duty of the Land Department and not the court to decide the question), but it has also heretofore held that it was also patentable as placer, for it awarded appellee a patent for its "Waterloo" placer (Rec., 157), and on November 9, 1911, awarded it a patent for its "Windward" placer pursuant to the order of Assistant Commissioner Proudfoot, date July 8, 1911 (Defendant's Original Exhibit X), wherein he states "since location was made and perfected prior to withdrawal *and the phosphate appears to be in the form of a placer deposit*, the purchase price having been paid, as per your abstract for December, 1910, final certificate may now issue," etc. And since the Harry lode decision, even as late as January 3, 1913, the Department has granted to appellee additional final certificates of entry for placer claims situated in northern Utah, located upon the calcium phosphate deposit. The Harry lode decision in no way binds

the appellee as to the claims here involved, and we think we can convince the Land Department that it should not be controlling for numerous cogent reasons, which it is unnecessary here to set forth. But whether such reasons are to prove sufficient or not, we claim the right under the law to present them to the Land Department, where the question is properly cognizable.

Counsel have cited in their brief, *Webb vs. American Asphaltum Co.*, 157 Fed., 203, and *San Francisco Chemical Co. vs. Duffield et al*, .... Fed., ...., both decided by the Circuit Court of Appeals for the Eighth Circuit, and wherein that court does pass upon the character of the mineral deposit. The *Webb* case involved a deposit of gilsonite which appeared in a well defined fissure and which the court holds to be subject to lode location only. The question of the right of the court to classify the deposit was not raised or passed upon by the court and the case is therefore of no assistance in reaching a conclusion upon that point. It is the only decision in the books up to the time of its rendition wherein a court has attempted to classify the public lands and determine under what form of entry they should be disposed of by the government. The other case cited is similar to the case at bar and is really the first adjudication upon the question now being discussed. The court relies upon the *Webb* case as authority and says:

“That case is directly applicable here, and we see no reason why, when Congress required that the adverse claimant, to maintain his claim, must invoke the aid of a court of competent jurisdiction



to determine the superior right as between the parties, it can be successfully said that the court, in making such inquiry, is prohibited from determining whether the land is subject to location in the mode and manner claimed by one or both of the parties.

“So, we think that, in determining the rights of the parties in these cases, our decision must rest upon the question as to whether the mineral land in controversy was of a character which entitled it to be located as a placer mine or whether it could only be entered as a lode mining claim. What may be the binding force and effect of the judgment in this case, in that respect, upon the Land Department, we are not called upon to decide.”

The reasoning of the court is not only unsound, but is opposed to the principles announced by the Supreme Court as well as the Land Department in the *Clipper Mining Company* case, *supra*. If the court determines the “mode and manner” of location to which the land is subject, is it not determining the character of the land? Is there not just as much distinction to be made and observed in the form of grant between lands which are lode in character and lands which are placer in character, as between lands which are agricultural and lands which are placer? As stated by Judge Van Fleet:

“The question as to the real character of the land sought to be purchased is no different in principle where it arises as between an agricultural claimant on the one side and a mineral claimant on the other, than where it arises between two

mineral claimants differing only in their claim as to which class of mineral lands, lode or placer, it is to be assigned. It is no more a question of law or less one of fact in the one instance than it is in the other."

It will also be noticed that the Circuit Court of Appeals for the Eighth Circuit states that while it must rest its decision "upon the question as to whether the mineral land in controversy was of a character which entitled it to be located as a placer mine or whether it could only be entered as a lode mining claim," it declines to decide what may be the binding effect of its judgment upon the Land Department. It would seem that a court should not undertake to deny to the prior locator who has complied with all requirements of the law, the right of possession of its claims by rendering a judgment which the court itself is not willing to assert may not be ignored by the Land Department. Based solely upon the character of the land, which basis the court will not say may not be destroyed by a departmental determination, it nevertheless prefers to deny the claim of the prior locator rather than to give it right of possession upon the basis of the stipulation as to its priority and compliance with the law and leave to the Land Department the determination of a question which has always been within its sole jurisdiction since its organization. Did not the Land Department in the Alice Placer decision, 4 L. Dec., 314; in Henderson vs. Fulton, 35 L. Dec., 652; in Utah Onyx Dev. Co., 38 L. Dec., 504; in its ruling upon the "Windward" placer and Harry lode applications, and in

innumerable other decisions, determine the character of the land, that is, whether it was lode or placer, so that it might say how and under what form of entry the government should part with its title? It having always been the conceded right of the Land Department to exercise sole jurisdiction in determining the question of the character and classification of the public lands not only when there was no adverse suit with respect to the claims passed upon, but likewise when the courts had already passed upon the right of possession (*Clipper Mining Co. case*, 194 U. S., 221; 48 L. Ed., 944; 33 L. Dec., 660, 667; 30 L. Dec., 401), what can justify the court now in interposing to determine it? We again insist that the court should award possession to him who, whether a lode or a placer claimant, was first in time and has complied with the law in establishing and maintaining his locations, and that under the stipulated facts in this case the decree of the District Court was clearly right and should be affirmed.

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### *LODE VS. PLACER.*

Because of the position taken by appellants on this appeal, we are, in the exercise of proper precaution, obliged to enter upon the discussion of the question of the character of the land covered by the mining claims in question, notwithstanding our firm conviction that it is not one with which the court is in anywise concerned. If, however, the court should determine to pass upon the character of the premises in controversy, we contend that placer and not lode is the



proper form of location to acquire title to the deposit of calcium phosphate.

Complainants allege in their amended bill of complaint, in substance and effect, that the mineral deposit sought by the respective parties is "a vein or lode of mineral bearing rock in place, containing phosphorite and valuable only for the said mineral contents thereof." Defendant in its answer denies this allegation and alleges to the contrary that "there is no mineral found within the limits of said placer mining claims, or any or either of them in the form of a vein or lode, or that is subject to location and acquisition under the laws of the United States by virtue of lode location."

Section 2320, Revised Statutes of the United States, among other things authorizes lode locations upon "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits." And Section 2329, Revised Statutes of United States, provides for placer locations upon all forms of deposit, excepting veins of quartz, or other rock in place."

Is the deposit in question, which is properly designated as calcium phosphate, a vein or lode? We must inquire into its nature, form, manner of occurrence, and other characteristics in order to correctly answer this question.

### *NATURE OF THE DEPOSIT.*

The best statement concerning the origin of this deposit and the best description thereof, is found in

the testimony of Mr. Weeks, who, as shown by the record, has had a very wide experience as a geologist and mining engineer, and who has made a more extensive and thorough investigation of rock phosphate than any other man whose testimony appears in the record, and undoubtedly as extensive an investigation both in the service of the Geological Survey and after he left that service as any man in the United States. According to his testimony, this phosphate rock is a part of a series of sedimentary deposits that are several thousand feet in thickness. The lowest bed of the series is a silicious limestone such as is found on the bed of the ocean. Upon this limestone was deposited the lowest bed of calcium phosphate, which is dark brown, or almost black in color, and which upon the claims in question is about five feet in thickness. Immediately above this bed of calcium phosphate is a layer of fossiliferous limestone, and above that alternating layers of calcium phosphate shale and limestone. The whole phosphate series from the underlying to the uppermost layer thereof—which latter is a bed of cherty limestone—is from sixty to two hundred feet in width, or thickness, the thickness varying in different localities. (Rec., 520, 521). The conclusion of geologists, accepted by all who have studied these deposits, and which from investigation has been demonstrated beyond question to be correct, is that the calcium phosphate is oolitic in character, that is, it is composed of oolites made up of a combination of calcium and phosphoric acid. These oolites or grains, assumed their form by the action of water in the same manner

that the sand oolites of the ocean beach are formed, and the hardened mass of calcium phosphate in its oolitic character resembles sandstone. It is agreed among men of science that the sedimentation occurred in water; that the phosphatic materials and soluble phosphates were washed down from the land areas surrounding the comparatively shallow sea wherein this bed was formed, and together with the phosphatic materials and soluble phosphates which were derived from the vegetable, animal and fish remains within the sea itself, were concentrated and by a washing process, or wave action, formed into oolites; that by a constant receding of the waters of the sea these oolites were, during the course of ages, gradually deposited as one bed, occupying a horizontal position, and these oolites, some in perfect form, others in a broken condition by reason of having been washed about, were in the process of sedimentation, cemented together by the deposition of calcium from the water, the cementation taking place after the oolites had found a resting place and were no longer disturbed by the movement of the waters; that by the process of cementation the oolites became a mass which solidified and became what is known as rock phosphate.

We have remarked that it has been demonstrated that the conclusion of geologists that this deposit was laid down in water, or is of marine origin, is correct, and the conditions which bear out this conclusion are, substantially, that not only is the phosphate rock itself composed of oolites which from present knowledge are produced only by the action of water, but there is found

in both the underlying bed of calcium carbonate, particularly in the bed of limestone immediately overlying the lowest bed of calcium phosphate, and also throughout the phosphate beds and the shales of the series, fossilized shells which are known to be marine shells. These fossils are not merely of occasional occurrence, but they are found in abundance, their nature and origin being learnedly discussed in a pamphlet by Dr. Girty of the Geological Survey. The reason for the conclusion that these deposits are of marine origin is very clearly stated by Mr. Bell, a witness for the appellee. He was asked by counsel for appellants if his conclusion "was not a mere theory," and replied:

"Well, it is more than a theory. If I can see a shell on the surface of the earth with a snail in it of a definite form, and I can go on to the sea shore and I can see another shell with an animal body in it like a mussel or clam alive, and see it move and breathe, I know that it exists. If I go into solid rock and see the fossil remains of a shell in just as perfect detail as the one that is alive today, I am positive in my own mind that it existed; that it lived and had a body and breathed and existed under the conditions of the one that I see before my eyes." (Rec., 824).

#### *EXTENT OF DEPOSIT.*

Recurring again to the evidence of Mr. Weeks, we are informed as to the extent of the western rock phosphate deposit. Defendant's Exhibit 1 was offered in

evidence for the purpose of illustrating this feature of the inquiry, and it shows that the deposit forms a part of the earth's stratification throughout an area of approximately 500 miles east and west, and 300 north and south throughout the States of Nevada, Utah, Wyoming, Idaho and Montana. (Rec., 559, 560). In addition to the area visited and examined by Mr. Weeks, the testimony of Mr. Breger (Rec., 665-671), confirms the statement of Mr. Weeks as to the great extent of this vast bed—only comparatively few outcroppings of which occur—and which, beyond question, underlies the surface of the hundreds of square miles of area described by Mr. Weeks and Mr. Breger.

#### *MANNER OF OCCURRENCE OF DEPOSIT.*

According to all of the geologists who testified in this case, this calcium phosphate deposit, in its solidified form, was by some mighty internal force lifted from its horizontal position and made to conform to the convolutions of the earth's surface. At various places on the crest of the upheaval it came to, or very near, the surface and has since been subjected to the process of erosion by the rains and snows of the centuries until from an examination of the vast area wherein this deposit is found, there are varying conditions with respect to its manner of occurrence. In some localities, for example, in the Sublette Range near Cokeville, the deposit occurs on a dip of about 65 degrees, while at other places, such as at Montpelier and Georgetown, the dip of the bed is in some places about 12 or 15 degrees only. In places the erosion has been



so great following the dip of the bed as to entirely remove all of the stratification, including the phosphate series, down to the underlying bed of calcium carbonate, which is clearly exposed. This occurs particularly in gulches, at the bottom and upon the sides of which, the underlying bed of limestone has been laid bare, while proceeding up the side of the gulch one will find immediately above this underlying bed of limestone, the lowest bed of the phosphate series, and farther up the hill the other strata of the series and also the cap line, except in places where some of the upper strata have also been eroded, and there has been left immediately upon the top of the underlying bed of phosphate rock itself, detrital materials deposited as wash from the higher ground. By reason of this erosion the line of the outcrop or highest point of exposure of the valuable underlying bed of calcium phosphate is very irregular, it being well illustrated by the black line on Defendant's Exhibit 2. The line of outcrop is highest on top of ridges and descends as erosion caused exposure on the sides of the gulches; the bed, however, always dipping to the west on the claims in question. The black line simply indicates the line of the bed as it is shown in its irregularity produced by the folding of the earth and by erosion. Exposures also occur in the creek channel of Montpelier Canyon, where the bed has been cross-cut and eroded away by the waters of Montpelier Creek. On the east side of the creek the bed is shown as it appears on its dip westerly from the black line running through the Arkansas claim (see Defendant's Exhibit 2), and on the west side of the creek in line

with the dip on the east side, the bed is seen as it continues downward toward the Bear Lake Valley. The strike of the bed is north and south and may be followed for several miles by the surface exposures and by the workings of those who have had and now have claims along it.

Each bed of the phosphate series maintains its individuality throughout, that is, the beds of calcium phosphate, fossiliferous limestone, shale and cherty limestone do not intrude one upon another. Each is distinct and never, throughout any of the workings, has it been discovered that one stratum has been substituted for or has taken the place of another either in whole or in part. (Rec., 566, 567, 746). Neither has it been shown upon any of the workings that any stratum pinched out. (Rec., 746). By an examination of the underlying bed of calcium carbonate, and of the fossiliferous limestone immediately above the valuable bed of calcium phosphate, one may see seams or cleavage planes in the rock, but in none of these planes or cracks has any of the calcium phosphate intruded; and even where the strata above the valuable bed are comparatively thin, they show no evidence of ever having been disturbed by the layer or stratum immediately above or below.

The phosphate rock may be, and has been mined by different methods. In some localities it is necessary to mine it in the same manner that coal is mined, while in other localities, such as at Sage, Wyoming, and at Montpelier, it could only be mined by quarrying. (Rec., 458-460, 746).

*THE USE OF PHOSPHATE ROCK.*

Calcium phosphate is used as a fertilizer and for no other purpose. (Rec., 342, 545). Only the lower bed of the phosphate series is of any commercial value (Rec., 738, 739), and it is upon this that all the discoveries of both complainants and defendant were made. This bed is composed of about seventy per cent calcium phosphate; that is, seventy per cent of a combination of calcium and phosphoric acid. The manner of its preparation for market is explained by Mr. Weeks at pages 545 and 546 of the record, and in succeeding pages he explains how the prepared product is used and also its chemical and mechanical effect upon the soil. It is not mined, as is contended by some of the witnesses for the complainants, for the phosphorus it contains; neither is it used for the phosphorous content. The rock is valuable because it is a combination of phosphoric acid with calcium. (Rec., 545). It would be impracticable to provide phosphoric acid as a fertilizer unless in combination with the calcium (Rec., 547), and both of these constituents of the rock are highly valuable, the phosphoric acid as food for the growing plant, and the calcium to a limited extent also as a plant food, but primarily valuable as a sweetener of the soil in the same manner that gypsum or land plaster is a soil sweetener, or as common lime is valuable for the same purpose. (Rec., 549, 550). As explained by Mr. Weeks, who, by the way, is a chemist, and also a practical farmer, who has purchased and used phosphate rock both in the prepared and unprepared state (Rec., 544, 548, 549, 550), it is a question



of the condition of the soil as to whether the prepared product or the raw phosphate rock itself is the more valuable for fertilizing purposes. (Rec., 549, 550, 551). If the humus has been removed from the soil the prepared product is preferable. If, however, the land possesses considerable humus, the raw phosphate rock is more effective. However, whether used in the raw or in the prepared state, it is mined as a whole and is used as a whole, and is not subject to any process whereby any mineral contained in the rock is extracted. (Rec., 548, 551). The deposit, so far as it has any value, is, in the words of Mr. Bell, "simply a consolidated natural manure, and its chief use in commerce would be for that purpose, for fertilizing land." (Rec., 780).

### *SECTIONS 2320, AND 2329, R. S. U. S.*

There can be no doubt that the ground in question is mineral land within the purview of the laws of the United States. (Northern Pac. R. R. Co. vs. Soderberg, 188 U. S., p. 524; 47 L. Ed., p. 575). Phosphate land has been so declared by the Department of the Interior, 18 L. D., 58; 26 L. D., 600; but in view of the origin, ~~properties~~ ~~proportion~~, manner of occurrence, method of mining and use of this deposit, can it be said that it should be located as a vein or lode? Our construction of Section 2320, Revised Statutes of the United States, which is, we think, the only construction that is reasonable and consistent with the history of mining, is that before a deposit is subject to lode location it must be

a "vein" or "lode," and these words being used synonymously, we say that in short the deposit must be a "vein." The words of the statute are "vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits." There is no comma after the word "quartz;" the statute, therefore, does not mean that not only may veins or lodes of quartz be located as lodes, but also other rock in place not a vein or lode, but it means that veins or lodes of quartz bearing the enumerated metals, or other valuable deposits, may be located as lodes, and also that "*veins*" or "*lodes*" of other rock in place, bearing said metals and other valuable deposits are subject to lode locations. To make ourselves clear, we contend that to be locatable as a lode, the deposit must be a vein or lode of quartz or a vein or lode of other rock (not quartz) in place, bearing gold, etc. "All forms of deposit excepting veins of quartz or other rock in place" are patentable as placer and rock in place when not a *vein* has been repeatedly declared to be subject to placer entry, as appears from the rulings of the Land Department, of which the following are a very few:

In *Collins vs. Kelly*, 12 L. Dec., 1, the Secretary of the Interior suggested that limestone used for making lime would be properly located as placer, and this suggestion was followed in *Shepherd vs. Bird*, 17 L. Dec., 82, where the question as to how such a deposit might be acquired was raised.

In *Henderson vs. Fulton*, 35 L. Dec., 632, it was held that marble is subject to location as placer and

not as lode. We shall have occasion to again refer to this decision.

In *McGlenn vs. Weinbroeer*, 15 L. Dec., 370, it was held that building stone was locatable as placer; and this decision was rendered without applying the law of 1892, which expressly authorized a placer entry of such deposits, the right to the ground, having initiated prior to the passage of that law. See also 3 L. Dec., 116.

Gypsum, also, is subject to placer location (*Morrison on Mining Rights*, p. 243, 244; *Shamel on Mining Law*, p. 277), and the same is true of phosphate rock itself. (Defendant's Exhibit X; 18 L. Dec., 58).

The foregoing decisions are cited for the purpose of justifying our construction of the statute that it is not enough that the deposit be "rock in place" to exclude it from location as placer under Section 2329, or to warrant its location as lode under Section 2320. These adjudications in effect hold that where there is no vein and the "rock in place" is a valuable mineral deposit, it is subject to location as placer. (3 L. Dec., 116).

The idea which we have above expressed with reference to the construction of Sections 2320 and 2329 is sustained by *Lindley on Mining Law*, Vol. 1, Sec. 299, wherein he states:

"A vein, or lode, is necessarily 'in place.' The condition of being 'in place' is one of its essential attributes. The term 'quartz or other rock in place,' as used in section twenty-three hundred and twenty of the Revised Statutes, refers to its con-

stituent elements, or the 'filling' of veins and lodes. Experience has shown that mineral substances in veins, or lodes, are not always found in quartz. Sometimes the vein material is composed mainly of the same character of rock as the inclosing walls—the occurrence of mineral being in the form of impregnations, penetrating the country rock, or the mineral may be but a replacement of the original rocks. So the statute recognizing that while the material of most veins consists of quartz, yet, as this is not universally true, the alternative, 'or other rock in place,' was introduced. As quartz is a vein in rock in place, the statute would have been equally as comprehensive if instead of saying 'veins, or lodes of quartz or other rock in place' it had simply said 'veins, or lodes, of rock in place.' "

And the court in *Webb vs. Asphaltum Mining Company*, 157 Fed., 203, makes the following declaration:

"The distinguishing test which determines whether or not a valuable mineral deposit may be secured by a lode claim or by a placer claim is the form and character of the deposit. If it is in a *vein* or *lode* in rock in place it may be secured by a lode claim, and it may not be by a placer claim. If it is not in a *vein* or *lode* in rock in place it may be secured by a placer claim, and may not be by a lode claim."

#### *THE DEPOSIT IN QUESTION NOT A VEIN.*

What is a vein? There are various definitions of

rock; they are one and the same. The deposit is simply an aggregation of oolites (see Defendant's Exhibits 10 and 11), cemented together by calcium. The calcium itself in such combination is an essential element in making the deposit valuable, possessing as it does, properties which render the whole rock mass effective for fertilizing purposes.

*THE PHOSPHATE DEPOSIT DOES NOT BEAR  
OR CONTAIN ANY OF THE METALS OR  
SUBSTANCES ENUMERATED IN  
SECTION 2320.*

Excepting the cases of *Webb vs. Asphaltum Co.*, *supra*, and *San Francisco Chemical Co. vs. Duffield*, .....*Fed.*, ....., both decided by the Circuit Court of Appeals for the Eighth Circuit, there is no adjudication that a deposit of a non-metallic mineral is subject to location as a lode; and as shown by the cases of *Iron Silver Mining Co. vs. Mike & Starr Mining Co.*, 143 U. S., 394; 36 L. Ed., 201, 210, and *United States vs. Iron Silver Mining Co.*, 128 U. S., 673; 32 L. Ed., 571, the Supreme Court of the United States has declared that there cannot be a lode location "until the discovery of a lode or vein bearing *metal*," and that by the words "veins" or "lodes" "are meant aggregations of *metal* imbedded in quartz or other rock in place," hence we say that one of the characteristics of a vein or lode is that it contains a metallic mineral. Under the construction of the statute as announced in the *Webb* case, the fact that calcium phosphate is a non-metallic mineral, is not, of itself, important in deter-



thing. Such a piece of broken oolite forms the center or nucleus of the subsequent oolite which is formed, which you will find forming these concentric forms or layers. So that the study of these oolites indicates from their structure and from the material of which they are made, that they are formed upon the ocean bottom, in which the water must have been comparatively quiet; nevertheless, there was sufficient movement of the water, or currents, to move these oolites along, to abrade them, and in that movement they were gathering from the surface underneath the water, or from material in suspension in the water, the materials which formed the oolites. They were the first things that were formed in this phosphate rock. The cementing material, which is the calcium carbonate, was probably laid down in a form just about the same time that the oolites were formed, or immediately thereafter, and the whole mass of the phosphate rock is made up of these oolites, and of the calcium carbonate cement, which binds the oolites together into a rock stratum." (Rec., 521-523).

It cannot be said that this deposit is mineralized rock. "Two distinct constituent elements of vein matter or substance are clearly recognized as essential; the *rock* and the *mineral borne in the rock*." (Henderson vs. Fulton, 35 L. Dec., 652, 662). What rock have we here which bears a mineral? None; but we have a combination of calcium and phosphoric acid which is not only the rock but the mineral as well. There is no rock bearing any mineral and no mineral borne in any



eral of some kind or other, but it is not necessarily mineralized rock." (Rec., 594).

These definitions accord with that of Webster, that mineralized rock is "rock impregnated with mineral."

The manner of its deposition as stated by Mr. Weeks, and which statement is confirmed by Mr. Breger and Mr. Bell, precludes the classification of this deposit as either *mineralized* or *mineral-bearing rock*.

To quote further from Mr. Weeks:

"When you examine the phosphate rock in a hand specimen, the first examination one makes of its granular character it seems to be made up of grains, which are these little oolites; and if you take a piece of this phosphate rock and grind it down until it is very thin and spread it out upon a sheet of glass, and grind it so that you get cross sections of these oolites, so you can observe through the microscope the internal structure of these oolites, you will find that they are made up of concentric layers of I might call them concretions; they are layers of material, one layer upon another, of course exceedingly thin, and you will find in the center of these oolites, frequently, a small particle of calcite,—which is shown by the striations of the calcite material,—forming the nucleus around which these materials have accumulated forming the oolite; or you will find in the center of an oolite another oolite, which shows under the microscope to have been broken in two, and its edges made rough, as if it had been rolled around upon some

a more or less economical extent from such molten magma.

Q. Is this calcium phosphate a mineral-bearing or mineralized rock?

A. Decidedly no.

Q. Now, in mineralized rock, or mineral-bearing rock, what is the distinction which exists between such rock and this calcium phosphate?

A. In mineralized and mineral-bearing rock the distinction, perhaps the principal distinction, as I have indicated, is, that to have mineralized rock the country rock must be in existence—must have been in existence as such prior to the mineralization, and the mineralized or valuable mineral deposits must have been thereafter brought into their present position, and from without the limits of their present occurrence. These are perhaps the principal distinctions. The phosphate rock was an original sedimentary deposit; it was deposited along with the other strata, below it and above it, to the extent of all the present valuable mineral deposits it bears, and there has been no mineralization or deposition of valuable mineral deposits therein after these rocks have become rock in place. (Rec., pp. 685, 686).

Mr. Weeks stated on cross-examination:

“My conception of mineralized rock is a rock into which mineral has come in some form after the formation of the rock itself. All rock is min-

A. Mineralized or mineral-bearing rock is rock in which mineralization has taken place.

Q. Explain in what manner mineralization takes place to constitute the mineralized rock?

A. To constitute the mineralized rock it is necessary to have the rock in place originally, before mineralization takes place. That is necessary to begin with. Thereupon mineralization of the rock may take place by various methods, chief among which are the following: Fissure veins, or vein deposits of a general type of fissure veins, which mineralizations take place in crevices, fissures, or other cavities in such rock, by injection from without of valuable or other materials, usually carried in aqueous solution into such fissures, crevices or cavities. There are also replacement mineralizations, wherein the mineral-bearing solutions, or other mineral carriers, are deposited between the grains of rock in place, and such deposits are usually associated with the replacement of the constituent grains of the rock, to a greater or less extent, by the valuable minerals or mineral-bearing deposits in question. Such deposits are known as replacement deposits, as distinct from fissure-vein deposits. There is a third class of deposits, which hardly enters into the present discussion, and is known as magmatic segregations. Such deposits are confined entirely to granite and gneisses and original archaen or primitive rocks which have been molten, and mineral depositions separating out to

A. That is classed as generally true, but often a fissure is formed by chemical action of metals in the form of salts, or acids, etc., being in the water and eating away the walls and making deposits in the cavity that has been eaten away.

Q. But, nevertheless, the substance for which the miner is seeking, and which constitutes the valuable property, comes into the fissure after it is created, whether it is created by this eating away, or whether by some internal force that parts the rock?

A. Yes, sir; it is a concentration in the crevice.

Q. Yes, in the crevice. Now, is there any crevice in this calcium phosphate deposit?

A. No; I have said it was a sedimentary deposit. (Rec., 364).

Mr. Wilson, another witness for the appellees, referring to the phosphate deposit, has this to say:

Q. Is it your interpretation of a fissure—so that I can get your idea of a fissure—as a mining engineer, do you contend that the space between what you call hanging and foot walls is a fissure?

Q. No, sir. (Rec., 448).

(See also testimony of Mr. Weeks, Tr., p. 234.)

### *THERE IS NO MINERALIZED OR MINERAL BEARING ROCK.*

Mr. Breger testified as follows:

Q. What definition do you give, Mr. Breger, of mineralized or mineral-bearing rock?

How many of these characteristics are possessed by this deposit of calcium phosphate?

We concede that it is rock in place having a dip and a strike in the same sense as limestone, gypsum, building stone, coal or any other rock formation which forms a part of, and is firmly fixed in, the mass of the hill, and that it usually occurs between a bed of overlying fossiliferous limestone, and an underlying bed of hard silicious limestone. This latter feature of the deposit, however, is not always present, for in some places it has no overlying rock, the same having been eroded and replaced by detrital materials washed from the hill above. In such localities the deposit occurs simply as a quarry and is and can be mined only by that method. Except in the particulars just mentioned it possesses none of the characteristics of a vein. We will now proceed to show from the evidence the many characteristics of a vein which this deposit does not possess.

*DEPOSIT NOT FOUND WITHIN A FISSURE OR CREVICE.*

Mr. Sterling, a witness for the appellees, testifies concerning the formation of veins as follows:

Q. But always this ore, or mineral rather, whichever you may term it, comes into the fissure whether from above or below, or from the sides, after the formation of the fissure. That is the accepted idea among geologists?

the proper form of location for a non-metallic mineral not under consideration by the Supreme Court when it made use of the expression; and this principle holds good in answer to appellee's attempt to control the court in determining what is a lode by the general definitions of the Supreme Court in the Eureka and Cheesman cases.

It is apparent from the authorities heretofore cited that in addition to its having a dip and a strike, the following are the usual characteristics of a vein:

(a) A fissure, crack or crevice in the earth's crust.

(b) The crevice must contain mineralized or mineral-bearing rock.

(c) Mineralized rock must be in place, and must be valuable for the mineral content which it bears.

(d) The rock in place bears one or more of the metals named in the statute.

(e) Such mineralized rock has been forced by internal heat and pressure from the depths of the earth in the form of solutions and gases, and, following the line of least resistance, has found its way along the rift or crevice, and there in time become solidified.

(f) The mineralized substance is foreign to the rock into which it has been injected.

(g) If (as in bedded veins) no well defined fissure was created by the internal forces prior to the injection of the mineralized solutions, there has been a partial dissolution of some particular stratum by the solutions and gases, and in place of the rock dissolved has been left the foreign mineralized matter.



lines or aggregations of metal imbedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of *metal in rock*."

United States vs. Iron Silver Min. Co., 128  
U. S., 673; 32 L. Ed., 571.

See also:

Bevis vs. Markland, 130 Fed., 226.

In the case of Webb vs. American Asphaltum Mining Company, 157 Fed., 203, the Circuit Court of Appeals for the Eighth Circuit, while holding that a deposit in order to be locatable as lode must be a *vein in rock in place*, seems to depart from the doctrine in the cases just cited that the deposit must be metalliferous, and holds that gilsonite *when appearing as a vein in rock in place*, though non-metallic, is subject to lode location. Of this decision Mr. Morrison in his work on Mining Rights, says: "It remains for the ultimate adjudication of the Federal Supreme Court before we can concede that it is a correct exposition of the law." Morrison (14th) Ed., p. 243. Assuming, however, that the Supreme Court would hold that a non-metallic mineral may be located as lode, the Webb case well illustrates the principle that general statements of the Supreme Court defining a vein or lode as *metal bearing* are to be considered in connection with the facts of the particular case before the court and not as controlling in a case wherein the court is called upon to determine

Reynolds vs. Iron Silver Mining Co., 116 U. S., 687; 29 L. Ed., 774, 777.

“With practical unanimity the authorities are to the effect that to constitute a vein or lode within the meaning of the statute, the mineral deposit must be borne in rock in place. *Mineral-bearing rock, in place*, or equivalent terms, are invariably used in defining what the law contemplates as a vein or lode. Quartz or other rock in place bearing gold, silver, etc., are the terms used in the statute. Two distinct constituent elements of vein matter or substance are clearly recognized as essential; the *rock*, and the *mineral* borne in the rock. To this extent, therefore, a general definition applicable to all cases may be given, namely: that a vein or lode to be locatable and patentable under the mining laws must possess the elements of rock in place bearing one or more of the minerals specified in the statute, or some other mineral that would be embraced within the words, ‘other valuable deposits.’ ”

Henderson vs. Fulton, 35 Land Dec., 652, 662.

“A right to a lode can only be initiated by location, and the statute declares that no location can be made until the discovery of *a lode or vein bearing metal.*”

Iron Silver Mining Co. vs. Mike & Starr Min. Co., 143 U. S., 394; 36 L. Ed., 201, 210.

“By ‘veins or lodes’ as here used, are meant

they be seen. Their existence may be determined by assay and analysis. *Id: Hyman vs. Wheeler* (C. C.), 29 Fed., 347; *Mining Company vs. Cheesman*, 116 U. S., 529, 6 Sup. Ct., 481, 28 L. Ed., 712. The controlling characteristic of a vein is a continuous body of mineral-bearing rock in place, in the mass of the surrounding formation. If it possesses these requisites and carry mineral in appreciable quantities, it is a mineral-bearing vein, within the meaning of the law, even though its boundaries may not have been ascertained.”

*Beads vs. Cone* (Col.), 62 Pac., 948, 952, 953.

“The veins, lodes or fissures mentioned in Section 2320 are found in the surrounding rock, and are described and defined in the case of *Iron Silver Co. vs. Cheesman* (ante. 712), recently decided in this court. Placer mines, though said by the statute to include all other deposits of mineral matter, are those in which this mineral is generally found in the softer material which covers the earth’s surface, and not among the rocks beneath. The one is only available by following this vein into its stony case in the bowels of the earth, detaching and bringing it to the surface and subjecting it to crushing, melting and other processes by which the precious metal is separated from the ore of which it is a part. In the other, the more usual way is to take the soft, earthy matter in which the particles of mineral are loosely mingled and by filtration separate the one from the other.”

Eureka case, 4 Saw., 302, and other decisions following and referring to that. In the Eureka case, Mr. Justice Field of the Supreme Court of the United States, said: 'We are of the opinion that the term (lode) as used in the Acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, 'all deposits of mineral matter found through a mineralized zone or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same process.' This definition would not include a bed of gravel from which particles of gold may be washed. The words 'mineralized rock' were evidently intended to qualify the last as well as the first sentence."

\* \* \* \* \*

"In practical mining, the terms 'vein' or 'lode' applies to all deposits of mineralized matter within any zone or belt of mineralized rock separated from the neighboring rock by well-defined boundaries, and the discoverer of such a deposit may locate it as a vein or lode. In this sense these terms were employed in the several Acts of Congress relating to mining locations."

Hayes vs. Laviguino (Utah), 33 Pac., 1029.

"The distinguishing feature between a vein and the formation enclosing it may be visible. It must have boundaries, but it is not necessary that

## CENTURY DICTIONARY.

“*Lode*—A metalliferous deposit having more or less of a vein-like character—that is, having a certain degree of regularity, and being confined within walls. Lode as used by miners is nearly synonymous with the term vein as employed by geologists, etc. The word would not be used for a flat, stratified mass.”

## CENTURY DICTIONARY.

“Veins are aggregations of mineral matter in fissures of rocks. Lodes are therefore aggregations of mineral matter containing ores in fissures.”

Von Cotta’s “Treatise on Ore Deposits,” Sec. 16 (Prime’s Translation).

“The word ‘lode’ is properly defined as a ‘zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock’ and does not apply to a bed of gravel from which particles of gold may be washed, although such gravel may be enclosed within defined boundaries.”

Gregory vs. Pershbaker (Cal.), 14 Pac., 401.

The court in the last case cited discusses the definition of Justice Field in the Eureka case, and in passing upon the contention that the deposit was lode, uses the following language:

“In support of their view, counsel cited the

in fissures, of certain mineral matter, usually in a purer and more sparry form than they exist in the rocks. The accumulation has in all cases taken place subsequently to the formation of the fissure and by slow process."

In *Con. Wyoming Gold Mining Company vs. Champion*, 63 Fed., pp. 544, 545, it is said:

"To constitute a vein it is not absolutely necessary that there should be a clean fissure filled with mineral, but it may and does exist when filled in places with other matter. The fissure should, of course, have form and be well defined, with hanging and foot walls."

The following are other definitions:

"*Vein*—An occurrence of ore, usually disseminated through a gangue or veinstone, and having a more or less regular development in length, width and depth."

\* \* \* \* \*

"A vein and a lode are, in common usage, essentially the same thing, the former being rather the scientific, the latter the miner's name for it."

\* \* \* \* \*

"A bed of rock forming a member of a stratified formation, with which it was synchronously deposited, cannot properly be called a vein or lode, even if it has metalliferous matter generally disseminated through it in quantity sufficient to be worth working."



dition, must be metalliferous—must contain some kind of mineral of value so as to distinguish it from the country rock.

\* \* \* \* \*

“The books tell us that vein-making fissures have been formed by contraction or drying, as in argillaceous stratum, or on cooling from fusion or from heat attending metamorphism; by subterranean movements, pre-eminently those which have attended mountain making; by the disruptive or expansive action of vapors resulting from volcanic action; and by corroding vapors, or by solutions from the deep, which sometimes enlarge the fissures, especially where the rock is limestone. (Dana, *Manual of Geology*). Fissures formed through volcanic action and enlarged by corroding solutions and vapors, are deep-seated, and frequently contain large cavities. That the vein in question was so formed by such action, and solutions or vapors appears from the testimony as we have already observed. It will be perceived that to define the word ‘vein,’ that represents a thing of so many and varied characteristics, is a matter attended with difficulty. Especially is this true if such definition, in view of the statutes which deal with mineral-bearing veins only, is to convey an accurate idea of the thing itself.”

La Conte in his “*Elements of Geology*,” page 234, says:

“True veins, then, are accumulations, mostly

“In determining the question before us, however, whether the finding of the court was warranted by the evidence, it is important to consider what constitutes a vein or lode. It will hardly be contended that merely because rock is broken, crushed, shattered or even fissured, it contains a vein within the meaning of the laws of Congress. All miners of any experience as well as men of scientific research, know that such occurrence may be found in the most barren country. Something more is necessary to dignify that kind of material with the character of a vein or lode.”

Grand Central Mining Co. vs. Mammoth Mining Co. (Utah), 83 Pac., 679.

This expression coincides with what we have heretofore stated, that it cannot be said that any given deposit is a vein or lode from the simple fact that it possesses any one, or even several, of the characteristics specified in certain definitions. As we have heretofore shown, the mere fact that it is rock in place is not sufficient to render it subject to lode location, nor is it sufficient, as stated above, to find broken, crushed, shattered or fissured rock. We must broaden our inquiry and ascertain whether the particular deposit in question before the court, possesses not merely one characteristic but all the characteristics which go to constitute it a vein or lode. The court in the above case continues:

“The material, whatever else may be its con-

Again, in speaking of mineral deposits in irregular forms (XCXX), it is said:

“It is certain that they were not deposited in the limestone bed when it was formed. On the contrary, they were deposited in their present position \* \* \* long after the formation and consolidation of the limestone.”

Again (CX):

“Generally speaking, it would seem to the author that an ore body, to be regarded in the eye of the law as a ‘lode,’ and which will be given all the legal attributes which belong to true lodes, must not only possess reasonable continuity, but must in itself represent some well defined and reasonably regular main channel of mineralization, through which the hot water and vapors ascended, and in which or along which they deposited their mineral solutions. This is an almost infallible test.”

“A vein or lode authorized to be located is a seam or fissure in the earth’s crust filled with quartz or with some other kind of rock in place, carrying gold, silver, or other valuable mineral deposits named in the statute.”

Jupiter Mining Co. vs. Bodie Con. Mining Co.,  
11 Fed., 675.

“What, then, is a quartz lode? It is a fissure or seam in the country rock filled with quartz matter bearing gold or silver, etc.”

Foote vs. National Mining Co., 2 Mont., 402.

decided, but their possible bearing on all other cases is seldom completely investigated.”

It is quite apparent that the question as to whether this deposit of calcium phosphate is a “vein” or “lode” is not to be determined by arbitrarily including it within the broad definitions and general statements of the court in the Eureka case and the Cheesman case, as was done by the Circuit Court of Appeals for the Eighth Circuit in *San Francisco Chemical Co. vs. Duffield et al*, . . . . . Fed., . . . . ., for those definitions were not announced when the question of the classification of calcium phosphate or any similar deposit having a like origin, a like appearance, or a similar use, was under consideration. In order to properly classify this deposit we must ascertain what are the characteristics of lodes or veins as they are known to practical miners, and to the mining industry. Let us see what these characteristics are:

### *CHARACTERISTICS OF VEINS.*

In the work entitled “The Law of Mines and Mining in the United States,” by Barringer and Adams, the following appears in the geological preface (XCIX):

“Generally speaking, a vein or lode represents some break or rift in the rocky crust of the earth, usually penetrating to a great depth, through which channel mineralized waters have ascended, and in which, on the sides of which, or in the rocks adjacent to which, they have deposited their mineral solutions until these have slowly filled and choked up the crevice.”

The term is not susceptible of arbitrary definition applicable to every case. It must be controlled in a measure, at least, by the conditions of locality and deposit. *Cheesman vs. Shreeve*, 40 Fed., 878."

*Beals vs. Cone* (Col.), 62 Pac., 948, 952, 943.

The Interior Department, also, has said:

"That it has been difficult, if not impracticable, to give any broad and general definition controlling as to all features and in all cases is beyond doubt. \* \* \* The authorities recognize that definitions have been given in some of the states and mining districts that would not be applicable to conditions in other states and mining districts."

*Henderson vs. Fulton*, 35 L. Dec., 652, 663.

In *Cohens vs. Virginia*, 6 Wheaton, 262; 5 L. Ed., 257, 290, Chief Justice Marshall said:

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case

Mr. Justice Field himself, clearly recognized the principle which should control in reaching a conclusion in this case. To quote:

“It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience.”

Barden vs. Northern Pac. R. R. Co., 154 U. S., 322; 38 L. Ed., 1000.

In Book vs. Justice Mining Co., 58 Fed., 121, it is said:

“The definitions of a vein or lode, as given in the authorities, are, as before stated, instructive, and worthy of consideration. *Their application to any given case must be determined by reference to the special facts which existed in the particular mining district where the lodes under consideration were located, in connection with the facts of the case before the court.*”

As stated in the Eureka case.

“It is difficult to give any definition of this term (vein) as understood and used in the Acts of Congress which will not be subject to criticism.”

And the Supreme Court of Colorado has said:

“Many definitions of veins have been given, varying according to the facts under consideration.



Now it was under the conditions above detailed that the foregoing definitions were announced. In both cases the deposits, without question, possessed the characteristics of veins; that is, they were deposits of *mineral bearing* rock lying within crevices, fissures or fractures made by the forces of nature into which this mineral bearing rock had been injected, and the only question determined in the Eureka case was whether one or more lodes or veins existed within the zone in controversy, and in the case of Iron Silver Mining Company vs. Cheesman, as to whether the lode or vein claimed by the defendant was a part of the lode or vein claimed by the plaintiff.

Under these conditions, it cannot, of course, be reasonably contended that the court intended to decide that every valuable deposit of mineral within well defined walls, is a lode or vein. It was not necessary for the court to render such a decision. This is clear from the following statement of the trial court in the Cheesman case, 8 Fed., 301:

“The words used in the statute to designate mineral deposit in rock in place are ‘vein,’ ‘lode,’ and ‘ledge,’ and these are supposed to be nearly synonymous in meaning. However these words may differ in meaning, it is not important in this case to look for a distinction between them. *Nor is it important to define their meaning in a manner that may be accepted in all cases. Any effort so to define them would probably result in a failure; but we must seek for a meaning which will enable us to reach a conclusion in this case.*”

bear in mind the circumstances under which these expressions were used, that is, the facts and conditions presented for the court's consideration. No definition should be accepted as a precedent unless the court believes that it was intended to apply to conditions presented in the case under consideration. In the Eureka case the question was not whether the deposit was lode or placer, but whether in its formation and manner of occurrence the deposit consisted of one or several lodes. The court found the formation to be a limestone which by the forces of nature had been broken and crushed, and wherein existed fissures, crevices and chambers into which had been injected in solution the metal bearing rock.

In the case of Iron Silver Mining Company vs. Cheesman, *supra*, the question of lode against placer was not in issue, but the observations of the court were made in connection with a determination of the question as to whether a certain deposit claimed by the defendant as the "Smuggler Lode" apexed in and was a part of the plaintiff's "Lime Lode." This question had been submitted to the jury, which had rendered a verdict in favor of the defendant upon the theory that the ground was so broken and disjointed and the several parts so intermingled that the "Smuggler Lode" was not a part of the "Lime Lode." The trial court in its instructions recognized the existence of the fissures and crevices, and the jury determined simply that the fissure and crevice claimed by the plaintiff was not continuous to the extent of taking on its dip the deposit of the defendant.

tial to the definition of a lode, in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the Acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found throughout a mineralized zone or belt coming from the same source, impressed with the same forms and appearing to have been created by the same processes."

In *Iron Silver Mining Company vs. Cheesman*, 116 U. S., 529; 29 L. Ed., 712, this definition is quoted with approval, as is also the statement of Judge Hallett in *Stevens vs. Williams*, 1 McCrary, 488, to-wit: "In general it may be said that a lode or vein is a body of mineral or a mineral body of rock within defined boundaries in the general mass of the mountain."

The definitions above given are quoted and relied upon by complainants, and they claim that the deposit of calcium phosphate in question comes within their terms as a body of mineralized rock within defined boundaries in the general mass of the mountain. In considering these definitions, however, the court will

the word as used in the mining law. In the Eureka case, 4 Sawyer, 302, Justice Field states :

“The Act of Congress, 1866, provided for the acquisition of a patent by any person or association of persons claiming a vein or lode of quartz or rock in place bearing gold, silver, cinnabar or copper.”

“The Act of 1872 speaks of veins or lodes of quartz or other rock in place, bearing similar metals or ores. Any definition of the terms should, therefore, be sufficiently broad to embrace deposits of the several metals or ores herein mentioned. In the construction of the statutes, general terms must receive that interpretation which will include all the instances enumerated as comprehended by them. The definition of a lode given by geologists is that of a fissure in the earth’s crust filled with mineral matter, or more accurately, as aggregations of mineral matter containing ores in fissures. (See Von Cotta’s “Treatise on Ore Deposits,” Prime’s Translation, 26). But miners used the term before geologists attempted to give it a definition.”

After quoting some of the testimony, Justice Field proceeds :

“It is difficult to give any definition of the term, as understood and used in the Acts of Congress, which will not be subject to criticism. A fissure in the earth’s crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essen-

mining how it should be located. The real question is whether the mineral, whatever it may be, is in the form of a vein in rock in place, as was the case with the gilsonite deposit. However, since we are pointing out the characteristics of veins which are not possessed by the calcium phosphate deposit, we call attention to the testimony to show that it is different from a lode formation as the Supreme Court defines it, in that the mineral is non-metallic.

Mr. Wilson, a witness for appellees, testified:

Q. Now, Mr. Wilson, you say that the mineral has the usual form of mineral-within this deposit?

A. Yes, sir.

Q. That is what is known, is it not, as a non-metallic mineral?

A. A non-metallic mineral, yes. (Rec., 435).  
There is in the evidence no dispute upon this point.

*THE DEPOSIT IS NOT A SUBSTANCE WHICH HAS BEEN FORCED BY INTERNAL HEAT AND PRESSURE FROM THE DEPTHS OF THE EARTH IN THE FORM OF SOLUTIONS AND CASES, AND WHICH, FOLLOWING THE LINE OF LEAST RESISTANCE, HAS FOUND ITS WAY INTO A RIFT OR CREVICE IN THE EARTH'S CRUST AND THEREAFTER BECOME SOLIDIFIED.*

This proposition needs no discussion because all the geologists admit that the deposit is sedimentary and was laid down in water in a horizontal position.



*THE BED OF CALCIUM PHOSPHATE WAS NOT  
FORMED BY A PROCESS OF REPLACEMENT AS IS THE CASE WITH  
BEDDED VEINS.*

Mr. Sterling, in his testimony, suggests that the deposit might have been formed by the phosphate materials replacing a bed of limestone. This suggestion finds no support when the deposit is examined. Where replacement has taken place there are always portions of the replaced stratum which have not been dissolved away. For example, where lead deposits are found as bedded veins, the solution has disintegrated a portion of the limestone bed, but other portions of that bed were not dissolved but remain in their original position, the solutions having eaten out and filled an irregular channel along the bed. In this deposit of rock phosphate no other rock or deposit is found. No portions of a dissimilar rock exist. The calcium phosphate itself occupies the whole plane and is in itself the original stratum. (Rec., 566, 820, 823). As stated by Mr. Weeks:

“There is no evidence—no indication at any of the many points that I have examined this phosphate bed, of a replacement process. \* \* \* In this bed of phosphate we find no particles of limestone or particles of other substances that might have been—some parts of them—replaced. The bed itself is everywhere composed of these grains, or oolites, and the material which cements them together, and we never find anything else in it.” (Rec., 566).



At this point we call to mind that appellants, in their brief, set forth a quotation from Lindley and cited the case of *Jones vs. Prospect Mining Co. (Nev.)*, 31 Pac., 642, to the effect that it is "utterly impracticable and useless to attempt to draw a distinction based upon the mode or manner or time" of the deposition of a mineral deposit, as it is "but little more than a matter of mere speculation." Such is not the condition with respect to calcium phosphate, for it is agreed by the witnesses of both parties that this deposit is sedimentary; that it was laid down in water and that it is a stratum of the Carboniferous Age, so the element of speculation is not present in this case. Furthermore, notwithstanding the expression of these authorities, we contend that it would be utterly impossible for the court to intelligently classify this deposit without an understanding of its origin, nature and use as well as the present manner of occurrence thereof. Should the court simply say it is "rock in place" and therefore lode? As we have shown, such a premise would not justify the conclusion. It must ascertain whether the deposit is a *vein in rock in place* and this question can only be determined by comparing the deposit with veins as they have been defined by the courts.

*PHOSPHATE ROCK NOT VALUABLE FOR ANY  
PARTICULAR MINERAL CONTENT, BUT  
ONLY AS A WHOLE.*

Mr. Guy Sterling, the chief witness for the appellants, represented himself as an expert on calcium phosphate, and testified that it is used as a fertilizer

and is commercially valuable for that purpose only (Rec., 342), though as to the rock phosphate in controversy he did not know where it was shipped, or what it was used for (Rec., 341); that he had never sold or bought a pound of it (Rec., 405). According to Mr. Sterling, the calcium phosphate deposit is not a placer because it is mined for its mineral content, phosphorus, and is not mined and used as a whole as is gypsum, limestone, building stone, cement, etc. (Rec., 346-351) Let us see how he sustains this assertion:

Q. Now isn't it true that it is not mined for that at all, but for the combination of the calcium and phosphoric acid?

A. No, the essential value of the rock is due to its phosphorous contents.

Q. And not for its phosphoric contents in connection or in combination with calcium?

A. No; if you had a pure bed of phosphorus—well, I will put it another way—if it was possible to get phosphorus by itself, it would be very easy to get the lime and other things to mix with this.

Q. That is true, but isn't it true that it is valuable because of the calcium that is now in combination with the phosphoric acid?

A. I don't think so.

Q. Now, is there a particle of phosphorus in this rock?

A. I don't say that there is—there is phosphorus in it, but not in the uncombined form.

Q. They don't mine it in order to get out any phosphorus in the uncombined form?

A. Not for fertilizing, but they do when they want phosphorus.

Q. I am asking about the fertilizers, that is what it is mined for.

A. Not exclusively.

Q. Out of these beds?

A. It may be now, but that does not apply to the future.

Q. There is not any phosphorus in it?

A. Not uncombined.

Q. And they don't mine it for phosphorus?

A. They do not now, but they may mine phosphate rock for phosphorus.

Q. They do not, and you don't know of any institution, or place where phosphate rock, this phosphate rock in this deposit that we are speaking of, this phosphate rock is treated to extract the phosphorus?

A. You are referring now directly and exclusively to this?

Q. I am referring,—

A. The claims shown on Exhibit No. 1?

Q. Yes.

A. I don't know where that is shipped to, or what it is used for. (Rec., 339-341).

Here we have the statement of this expert for the complainants that the rock is mined for the mineral content, phosphorus; that the only commercial use of

the rock is for fertilizing; that for fertilizing purposes no phosphorus is extracted from the rock, nor is it mined for the purpose of extracting any phosphorus; that it does not contain phosphorus in the uncombined form; and to these several contradictory statements he adds that he does not know what the rock is mined and used for. But let us go a little farther with this expert:

Q. Do you mean to say that it is mined for the purpose of getting this phosphorus out?

A. To put that phosphorus in shape for the plants to use.

Q. Now, don't you know, Mr. Sterling, that the plant cannot use phosphorus not combined, and could not take it up?

A. I did not say it did.

Q. Could it?

A. Not unless it was in soluble form.

Q. Could they take up phosphorus uncombined?

A. They could if in a soluble form, for all I know.

Q. Do you know?

A. I don't know.

Q. As a chemist?

A. I believe they could if it was in a soluble form.

\* \* \* \* \*

Q. Did you ever know or hear of such a thing as phosphorus in solution, uncombined phosphorus?

A. No; I don't believe it will go in solution alone.

Q. And therefore the plants could not take it up?

A. As I say, it has got to be in solution.

Q. It would be in solution, it must be, in order to take it up?

A. The phosphorus?

Q. Yes.

A. You can put it in the shape of phosphoric acid.

Q. You said you wanted it in solution. I am asking you how you can get it in solution?

A. By making phosphoric acid out of it, and it is—

Q. Is it phosphorus?

A. It is not phosphorus uncombined, but phosphoric acid.

Q. So that phosphorus uncombined is not a soluble substance, then?

A. Not in water.

Q. It is not a soluble substance?

A. Not in water. (Rec., 343, 344).

What an evident attempt on the part of this witness to avoid stating the true condition. He first states that the deposit is mined for the phosphorus, then he states that the phosphorus cannot be used unless it is combined with something else, but he will not admit that the calcium with the phosphoric acid makes the com-

bination which renders the deposit valuable rather than the phosphoric acid alone. After considerable sparring, however, he did finally admit that the deposit was valuable as calcium phosphate, and that the calcium was a material element in the value of the rock, as the following will show:

Q. Mr. Sterling, in relation to this, where calcium oxide is used as a fertilizer.

A. Calcium oxide?

Q. Did you not testify yesterday that it was used commercially?

A. I have testified yesterday that calcium sulphate was used as a fertilizer; you may call it—

Q. Well, that is commonly called gypsum?

A. Yes, sir.

Q. But I am talking about calcium oxide. Calcium oxide is used as a fertilizer, I mean the rock alone?

A. Limestone is, yes.

Q. Slacked lime?

A. Yes, sir. I suppose slacked lime might be used, too.

Q. Now, then, that is used for the benefit which will accrue to the land from the action of the calcium on the land?

A. Well, I must state that I do not—I am not absolutely sure that I know of any calcium oxide. You mean hydrate of calcium?

Q. Well, it is slacked lime?



A. Well, I don't think it is proper to call it calcium oxide.

Q. If that is not the proper term for it, and if I have given it wrong, answer as to what it is.

A. Slacked lime might be used just exactly as limestone is used. To sort of neutralize the—

Q. Alkali?

A. No, sir—well, it might be used to neutralize some of the alkalies, to correct any acidity there might be in the soil.

Q. And as a matter of fact, it is the calcium in it that has that effect?

A. Well, calcium with an earth alkali, and sometimes with some other alkalies, will make a chemical combination and have a sweetening effect.

Q. When slacked lime is used for the purpose stated isn't it true that it is for the purpose of sweetening the land, so to speak?

A. That is what would be used to neutralize the acidity.

Q. And therefore it is the calcium in it that has that effect, isn't it?

A. Yes, sir; partly.

Q. And the calcium phosphate would have like effect, would it not?

A. Why, I don't know, I must say, whether calcium phosphate could be broken up by any other alkali; it might have that effect.

Q. I am speaking about calcium phosphate as it is used as a fertilizer. Would not the calcium

unite and operate to a degree in the same way that the calcium in this lime would operate?

A. As I say, I don't know; I don't think so.

Q. Why do you say you do not think so?

A. Because calcium hydrate, that which is a combination of hydrogen and oxygen and calcium, would act upon, for instance, some of the sodium salts or potassium salts, or with some weak organic acid, where calcium phosphate would not be effective.

Q. Do you mean to say that this calcium that is in the calcium phosphate would be of no benefit whatever upon the land?

A. Not in the sense that—

Q. Would it in any sense?

A. It would be so very slow—it is so insoluble under ordinary conditions that for any practical effect I would consider it useless.

Q. But after the treatment?

A. After the treatment, that is another matter.

Q. Well, then, after the treatment, as you have explained the treatment, as I understand it, after the treatment has been given to the calcium phosphate rock, then would not the calcium in that rock have a beneficial effect as a fertilizing element on the land?

A. After the treatment?

Q. That is what I say.

A. The calcium—

Q. Can't you answer that question yes or no?

A. I am going to. After the treatment the calcium phosphate is changed into different forms of calcium phosphate, some of which is soluble and a part of the calcium is changed into calcium sulphate, that is, gypsum, by this treatment, and that, of course, the gypsum so far as it extends, would have just the same effect there as if it was applied raw.

Q. How about the balance of the calcium that is not changed to a sulphate?

A. It is still in combination with the phosphoric acid, and it is in soluble shape. My opinion would be it would not have this neutralizing effect, because they are acid calcium phosphates.

Q. And it is your information, and do you state positively, that this treatment changes this calcium into calcium sulphate?

A. Part of it.

Q. Did you analyze it?

A. I know it from the chemical formula.

Q. And that this calcium in this rock, after its treatment, has no effect upon the land at all beneficially?

A. I did not say that at all; I said it has no neutralizing effect.

Q. I am not asking about neutralizing effect: I am asking if it has any beneficial effect, and will you not answer my question?

A. I say I doubt whether calcium itself, ex-

cept that which is changed into gypsum, has any beneficial effect.

Q. Would you say that any portion of it would have any beneficial effect?

A. The part changed into gypsum would have some beneficial effect.

Q. What proportion is that? You don't know?

A. Yes.

Q. What proportion?

A. Why, I can tell it by referring to a work on chemistry.

Q. Well, state your opinion without such reference.

A. I say there is a lot of formula that would be useless for anybody to attempt to remember.

Q. I did not ask you that; I asked you if you knew what proportion of a given quantity of sulphate—or calcium phosphate—would be changed to gypsum, can you tell?

A. Yes, I think I can.

\* \* \* \* \*

Q. Go ahead and let us have it.

A. This (witness refers to a certain sample of phosphate rock) happens to be a high grade piece of rock. It carried 81 per cent of calcium phosphate, and 11 per cent of carbonate of lime, and there is a little magnesia, a little iron, and a small amount of insoluble material. Now, my opinion would be, when that was treated with sulphuric acid, that one-third of the calcium in the 81 per cent

which goes to make up the calcium phosphate in this sample, would be changed to gypsum, and that all of this 11 per cent of calcium carbonate would be changed into gypsum.

Q. So you would have there in the 100 per cent of this rock, 27 plus 11, equalling 38, approximately, per cent of that rock which would be changed into gypsum, which would have some beneficial effect?

A. It would have, as I have before stated, a mechanical and perhaps a chemical beneficial effect upon the soil.

Q. Now, the other rock from any other portion of these claims which are in question in this controversy, would have the same proportionate benefit, considering the quality of rock, that this would have?

A. If they have the same proportion of ingredients it would be just the same, but we have to keep in mind all the while that it requires that chemical treatment to bring about that condition.

Q. Do you not know, Mr. Sterling, that this phosphate rock, this particular rock, perhaps out of these claims, and phosphate rock such as this is, is used in its natural condition just as it is taken out of the ground?

A. I don't know, but I have heard of it, but I don't know of any company that makes a business of preparing and using and selling raw rock in any quantity in that way directly.

Q. There may be some, may there not?

A. Yes, sir.

Q. And if it was so used it would be beneficial?

A. In time, but there would not be anything beneficial owing to the lime or gypsum; it would be simply during the gradual dissolving of the calcium phosphate by the elements.

Q. And that would be beneficial?

A. Or that the phosphorus would become in such a condition it would be taken up by the plant, and the calcium would undoubtedly be set free and have a neutralizing effect on the soil.

Q. To that extent it would be beneficial?

A. Yes, sir.

Q. As it dissolved it would have that beneficial effect itself in time?

A. I think so. (Rec., 397-404).

So Mr. Sterling finally admits that whether the rock is used in the prepared or the natural form the calcium does have a beneficial effect upon the soil.

Because Mr. Weeks, a witness for appellee, classified arsenic and antimony as non-metals, counsel says his testimony is entitled to no weight. Mr. Wilson, appellants' witness, who is a chemist, says that it is uncertain how these two substances should be classified (Rec., 435). But assuming that Mr. Weeks is in error (and counsel says he is—Appellants' Brief, 93, 94), the quality of his testimony is very far superior to the biased statements of this man Sterling, upon whom appellants place their chief reliance, and who is so anxious to see appei-



lants prevail that in order to avoid the admission that calcium phosphate should be subject to the same form of location as calcium sulphate or gypsum, as it is commonly called, declares that calcium phosphate is not locatable as placer because it is treated chemically after it is mined (Rec., 349), and that the manner of locating it should be determined by the manner of such treatment (Rec., 358). Not only in his testimony above quoted, but throughout his entire cross-examination, Mr. Sterling qualifies, equivocates, trims and sidesteps in his attempt to avoid any statement of fact which might operate in favor of appellee, and he convicts himself of being not only prejudiced and unfair, but deliberate in his attempt to conceal the truth.

Notwithstanding counsel's refusal to accord his testimony proper credit, the evidence shows that Mr. Weeks has not only studied phosphate rock and the method of its treatment (Rec., 545, 546), but has purchased and used the rock both in its prepared and unprepared state (Rec., 545 and 549). He therefore should know for what purpose the calcium phosphate is mined and for what it is valuable. He testifies:

Q. What proportion of calcium phosphate does this rock contain that is found in these beds on this property—on these claims in question?

A. It goes about 70 per cent.

Q. And is it mined or used for phosphorus or for any phosphorus content in it?

A. No, sir; there never has been any phosphorus made from this rock that I know of.

Q. Is the calcium—the constituent of calcium that is found in this rock—of beneficial use as a fertilizer on the land?

A. Yes, sir.

Q. And what effect does it have?

A. The effect of the calcium in the calcium phosphate is similar to that of ordinary lime, which we put upon the soil to sweeten it.

Q. What would be the effect of using the phosphoric acid that is within this deposit, if the calcium were extracted and the phosphoric acid alone was used?

A. Well, I don't think you could use it in that way. You would have to have some material to carry your phosphoric acid, in order to put it upon the soil.

Q. If it could be carried, what would be the effect of it? Would it be beneficial or otherwise?

A. Well, I don't know. I think it would be entirely speculation to say what would be the result.

Q. How does the phosphoric acid act upon the land, as compared with the calcium that is in this calcium phosphate, and how do the two act together as a fertilizer?

A. Well, the calcium—the combined calcium phosphate which is in the fertilizer, acts in two ways, one of which furnishes phosphoric acid for use to the growing plant, and the calcium, which is the chemical combination, acts in sweetening the land, or in changing its mechanical condition so as to improve the quality of the soil.

Q. Is it essential that calcium be used in connection with this phosphoric acid in this deposit for fertilizing purposes?

A. Yes, sir.

Q. Now, in the preparation of this rock, is there any sorting of it, or any part of it that is not used as fertilizer?

A. None at all; it is all used.

Q. And is there any part of it that is not beneficial to the land when treated as you have described it?

A. Well, it is such a small part that it is almost infinitesimal. There is a small amount of silica shown in various chemical analysis that would probably neither be beneficial nor otherwise to it, but it is exceedingly small.

Q. But speaking of calcium phosphate itself: is there any part of it that is not beneficial?

A. No, sir.

Q. And is this phosphate rock mined and used as a whole?

A. Yes, sir. (Rec., 547, 548).

Q. You spoke of the plant taking up the calcium phosphate. I will ask you whether or not this phosphoric acid is the only constituent which is used by the plant?

A. No, I don't think so. There is some lime that is used by practically all plants; and undoubtedly some of the lime or gypsum which is in the

treated fertilizer would be used by the plant. (Tr., p. 224).

Q. For what purpose is gypsum used, Mr. Weeks, I mean for fertilizing purposes?

A. In the same way that we use lime for treating soil which is becoming very sour and will not yield paying crops.

Q. And what effect does the calcium in the calcium phosphate have. Does it have a different effect, or the same effect, or a similar effect to the gypsum or lime?

A. My own experiments, if you may call them such, show that the calcium phosphate will sweeten the soil to a very considerable extent, and doubtless in the same way, the same chemical combinations taking place, and the chemical conditions being made, that occur with lime.

Q. What proportion of this calcium phosphate is calcium, what per cent approximately?

A. I have forgotten exactly; calcium carbonate runs up to something like 30 per cent.

Q. In what states, Mr. Weeks, from your study of this question, have experiments been made as to the profitable use of this phosphate rock in its raw state, and covering what periods of time?

A. Experiments have been made with the raw phosphate rock in Maine, Massachusetts, Rhode Island, Pennsylvania, Maryland, Ohio and Illinois. They are experiments of what are known as the

United States Experiment Stations, conducted under the Agricultural Department, and those experiments cover a period of from five years as a minimum, in Illinois, to 21 years as a maximum in Massachusetts.

Q. And compared with the use of the rock in its treated state, what do those experiments show?

A. In the various publications which I have read describing those experiments, the summary or conclusion is that under proper conditions (where a large amount of humus exists), the raw phosphate rock is worth probably double what the treated rock is. The experiments in Maryland were conducted at the station at College Park. I have been there a good many times, in different seasons and at different years, watching the results of these experiments, and it was as a result of these personal observations there in the field that I began the use of the raw rock upon my own farm.

Q. And in the conduct of these experiments I will ask you whether or not there is any sorting process, or whether the rock is used as a whole?

A. Well, so far as I know, there is no sorting process. The material as it comes out of the sack as you buy raw rock, looks like raw ground phosphate rock. (Rec., 549-551).

We have quoted extensively from the evidence upon the question of the character and valuable properties of this rock in order to convince the court that our conten-

tion is well founded that the characteristics of a vein, to-wit, rock in place bearing a certain valuable mineral to be extracted, is not present in this deposit. The foregoing testimony clearly shows that this calcium phosphate is not valuable, is not sought after, is not mined or used for any particular mineral, but is mined and used, and is valuable only for the combination of calcium and phosphoric acid; the calcium as well as the phosphoric acid being a necessary and beneficial constituent just as it is beneficial in gypsum and lime. Calcium phosphate belongs to the same category of mineral deposits as gypsum, guano, limestone, borax, salt, kaolin, cement, etc. This is evident from the authorities (Morison on Mining Rights, 14th Ed., p. 243; Shammel on Mining Mineral & Geological Law, pp. 58, 277; Outlines of Mining Law by C. B. Jack, p. 70, Index p. 115), as well as from the testimony of Mr. Wilson, who states at pages 438 and 439 of the transcript that calcium phosphate is composed of the metal calcium (this metal, however, is not in its metallic form when in combination), and the non-metallic mineral phosphoric acid; salt, of the metal sodium in combination with the non-metallic mineral chlorine; gypsum, of the metal calcium in combination with the non-metallic mineral sulphur; limestone, of the metal calcium in combination with the non-metallic mineral carbonic acid, and all these deposits are mined, are of commercial value and are used as a whole. The deposit is a bed just as the deposits above named are beds. Encyclopedia Britannica, 9th Ed., in the article on "Mining," classifies mineral deposits as follows:



- A. Tabular Deposits. 1. Beds.  
2. Mineral veins or lodes.

B. Masses.

In discussing "beds" it is said:

"Geology teaches us that a large proportion of the rocks met with at the surface of the earth consist of substances arranged in distinct layers, owing to the fact that these rocks have been formed at the bottom of seas, lakes or rivers by the gradual deposition of sediment, by precipitation from solutions, and by the growth or accumulation of animal and vegetable organisms. If any one of these layers consists of a useful mineral, or contains enough to make it valuable, we say that we have a deposit in the form of a bed, stratum or seam. Of course the most important of all bedded or stratified deposits is coal, but, in addition, we have beds of anthracite, lignite, iron ore, especially in the oolitic rocks, cupriferous shale, lead-bearing sandstone, silver bearing sandstone, diamond, gold, and tin-bearing gravels, to say nothing of sulphur, rock-salt, clays, various kinds of stone, such as limestone and gypsum, oil-shale, alum-shale, and slate.

To briefly summarize, then, the evidence shows that the calcium phosphate deposit lacks the following characteristics of a vein, to-wit:

1. It is not found within a fissure, crevice or rift in the earth's crust.
2. It is not mineralized or mineral-bearing

rock, nor is it valuable for any specific mineral content, but only as a whole.

3. It contains no metallic mineral.

4. It was not deposited by being forced from the depths of the earth by igneous action, nor was it deposited by replacement.

5. It invariably conforms to the stratification in which it is found and does not break through it as does a fissure vein or replace it, as does a bedded vein.

6. It is not foreign to the country rock, but is of exactly the same character (sedimentary) and forms a part of the earth's crust as originally laid down, and occupies the same position (horizontal), as originally deposited except that in certain localities it has been given a dip and a strike by the uprising or folding of the earth.

In addition to these distinctive characteristics, we will also add that it contains abundant specimens of fauna, and fauna has never been known to exist in a vein though it has been found in the country rock of veins. (Rec., 577).

Furthermore, a vein has an apex conforming to the strike from which may be determined the owner's rights on the dip. This deposit does not have an apex, but simply an irregular exposure in various places occasionally along the strike, but more often not, and sometimes the exposure (claimed as the apex by the lode claimants). is actually on the dip of the bed far below the

highest point of exposure. For example, the "Tennessee lode" is located on the exposure along the side of a gulch at right angles with the strike, and having end lines 1500 feet long and side lines 50 feet (it lies within the patented Waterloo placer), while the "Mt. Pleasant lode" is located on the exposure on the upper side of Montpelier Creek channel, at variance with the strike, and with the dip of the deposit up the hill towards the "Arkansas." "It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike outside of his side lines." (Mining Co. vs. Tarbet, 98 U. S., 463, 467). Of all the lode claims the "Hickman" only is located along the strike (Rec., 771-772), and it is not located on the apex (so called) of the deposit, for as shown by the black line on Defendant's Exhibit 2, the deposit occurs above the "Hickman." The same is true of the "Obed" lode. As Mr. Bell states, if this deposit were locatable as lode a location on the "Wilmington" placer across the gulch and higher than the "Obed" would steal a third of the apex of the "Obed." (Rec., 766). The "Overton" is not located on the apex; in fact, this claim has no apex. It covers the exposure of the deposit on the lower side of the creek channel opposite the "Mt. Pleasant," the exposure shown on both these claims having been due to the erosion by the creek. The "Arkansas" is the uppermost location of the very same bed which on its dip extends down the hill to the creek bed where, as before stated, it is again relocated both where it emerges on the "Mt. Pleasant" and where it disappears on the "Over-

ton." The very manner of laying out these lode claims is proof that such a deposit as this cannot with reason be held to be subject to lode location. It is nothing more nor less than a great blanket of sediment hundreds of square miles in extent, exposed where the waters and snows of creeks and gulches have eroded the surface, leaving an irregular edge (as shown by the black line on Defendant's Exhibit 2), which dips and curves in degree according to the extent erosion has taken place; the uplifted condition of the bed in some localities being a mere accident of nature and not presenting what may be termed the typical form of the deposit, which may be said to be horizontal, or nearly so.

It was not the intention of the law to grant extralateral rights to a deposit of this character. The law contemplates that a discoverer of a vein may pursue it from its apex indefinitely on its downward course because a vein occupies (usually) a fracture of the earth's strata, but it does not contemplate that lode locations shall be made on one of the stratum itself. This deposit or stratum is known to extend on its dip for a distance of eight miles (Rec., 680, 735), and in places is visible as a continuous sheet or plane for a distance of twenty miles. (Rec., 669). Furthermore, in some localities, for instance, at Georgetown, the deposit (see Defendant's Exhibit 5), is folded and presents a sincline; on one side of the fold the bed dips to the west and on the other to the east. Were lode locations ever intended to apply to such a formation?

From all these conditions it is quite apparent that while calcium phosphate is "rock in place" it is not a

“vein,” and is therefore subject to location only as placer.

We shall now discuss the validity of the lode locations in view of the circumstances under which they were made.

### *LODE LOCATIONS INVALID.*

It is stipulated that the physical acts required by law to perfect lode locations, were performed, but with the reservation that the evidence as to the circumstances under which they were performed, shall be given full effect. (Rec., 453, 454).

It appears by the pleadings that the premises in controversy are valuable only for the calcium phosphate deposit, and the proof shows that discovery and assessment work was done by appellee and its predecessors in interest upon the phosphate bed. We shall now present our reasons why appellant's locations were and are invalid.

### *LODE CLAIMANTS TRESPASSERS.*

We are not unmindful of the decisions to the effect that known lodes within a placer are subject to location either by the placer entryman himself or by any other person qualified under the mining laws to locate mineral lands, but this case does not fall within that rule. We have shown that this deposit in question is not a lode, but we shall point out other considerations which justify the exception. Where the right to locate a lode within a placer has been upheld it has been upon the theory



that the deposit ascertained to be a lode was not the deposit located upon by the placer claimant and the deposit located as lode was such that the government had recognized possession thereof under lode locations only. In such cases the placer locator had discovered and was developing an altogether different deposit from the deposit claimed by the lode location. Under such conditions the courts have upheld the right of another person to locate upon a recognized lode formation which the placer claimant did not and could not under the law assume to possess, but in this case the conditions are quite different. The calcium phosphate bed is the deposit upon and for which the placer locations were made. It is the only valuable mineral deposit within the boundaries of such locations. It is the deposit which the placer claimant has possessed and over which it has exercised dominion in maintaining its locations and performing assessment work. Under these conditions appellants are certainly not to be considered in the same light as one who seeks to acquire a deposit which the placer locator does not claim, but rather as deliberate intruders and trespassers. Appellants will argue that defendant was not and could not, by virtue of its placer locations be in possession of the conflict area because the ground is not placer ground. In the case of Clipper Mining Co. vs. Eli Mining Co. (Col.), 68 Pac., 286, substantially the same contention was made, but the court justified its decision for the placer claimant upon the ground that said claimant was prior in time and had performed the annual assessment work required by law. The land had not been classified as non-placer by the



Land Department and the court held that the placer location gave a right of *exclusive* possession such as prevented the initiation of any rights by other persons who might prospect for or locate lodes thereon. This case, which we have heretofore cited, clearly recognizes that where, as in the case at bar, the same ground is claimed under different locations, the right of possession is in the prior locator who has complied with the law and that to the Land Department is left the classification of such land. To quote from the opinion by Justice Brewer:

“It must, therefore, be accepted that the Peacl placer claim was duly located, that the annual labor required by law had been performed up to the time of the litigation, that there was a subsisting valid placer location, and that the lodes were discovered by their locators within the boundaries of the placer claim subsequently to its location, so the trial court specifically found, and its finding was approved by the Supreme Court.”

\* \* \* \* \*

“So far as the record shows—and the record does not purport to contain all the evidence—the *placer location is still recognized in the Department as a valid location.*”

“Such, also, was the finding of the court; and being so, there is nothing to prevent a subsequent application for a patent and further testimony to show the claimant’s right to one. Undoubtedly when the Department rejected the application for patent it could have gone further and set aside the

placer location, *and it can now by direct proceedings upon notice, set it aside and restore the land to the public domain.* But it has not done so, and therefore it is useless to consider what rights other parties might then have.”

Clipper Mining Co. vs. Eli Mining Co., 194 U. S., 221, 223; 48 L. Ed., 948, 949.

It is our contention here, that while appellee held such possession of its placer claims as would satisfy, or be recognized by, the Land Department, appellants could not prospect for lodes (which their agents were in the act of doing when ordered off by Mr. Sullivan) (Rec., 491), or make valid lode locations. Did appellee have possession such as the Land Department recognizes in locations upon the deposit of calcium phosphate? Let us see: The Department prior to appellants' lode locations had recognized appellee's possession as a placer claimant as sufficient by the issuance of patent to the "Waterloo" placer in 1906; and since the filing of this suit it has repeatedly recognized possession under placer locations as sufficient, by the issuance to the Utah Fertilizer & Chemical Mfg. Company of final certificates which embrace more than 600 acres of this same deposit (Defendant's Exhibits 6 and 7, Rec., 841-843); and by the issuance to appellee of a final certificate (Defendant's Exhibit X) and patent for the "Windward" placer adjoining the Montpelier group involved herein; and for the "Layland" placer in the Sublette range in Wyoming, near the claims involved in the case before the Circuit Court of Appeals for the Eighth Circuit. (De

endant's Exhibit 8, Rec., 846-847). If possession in those cases was a sufficient possession under the law, was not appellee, having performed all physical acts to render its locations valid, in possession of the premises in controversy when the appellants attempted to make their lode locations in November, 1907? Was not appellee's possession of its placer claims at that time just as effectual as its possession of the "Waterloo" before it received patent therefor, as effectual as its possession of the "Windward" and "Layland" claims; as effectual as the possession the Utah Fertilizer & Chemical Mfg. Co. exercised with reference to its claims near Georgetown? It is quite apparent that in the absence of a classification of the ground as non-placer by the Land Department, appellee's locations were valid and their right to exclusive possession complete.

Appellants set forth in their brief the decision of the Assistant Secretary of the Interior holding the Harry lode claim patentable and discussing in a general way the western phosphate deposits. In this decision Assistant Secretary Adams refers to the report to the Land Department covering the "Lorine" lode which adjoins the Harry lode, and upon this report bases his conclusions as to the character of the deposit. This report was made by Mr. Guy Sterling, who testified on behalf of appellants herein (Rec., 318; Appellant's Brief, 117), and the court will notice that at the time Mr. Sterling submitted his report he was interested in lode locations upon this very deposit of calcium phosphate (Rec., 380, 381, 391), notwithstanding the fact that he was a Deputy Mineral Surveyor and that the penalty for

such an officer becoming interested in the purchase of any of the public lands, directly or indirectly is removal from office. In re Bradford, 36 L. Dec., 61. He did not inform the Department of his interest in having the deposit declared to be a lode in the "Lorine" case. (Rec., 392). In his report Mr. Sterling indicates clearly his prejudice in favor of lode locations. For example, in describing the formation he is careful to repeatedly designate the alternating strata of calcium phosphate as "veins," and against the weight of reason and contrary to the facts clearly established by the evidence suggests the process of replacement of beds of limestone by the phosphate as the probable manner of deposition. This suggestion was undoubtedly made to induce the classification of rock phosphate with bedded veins when in fact they are totally dissimilar. The report is not only highly colored and misleading in favor of the lode theory, the reason for which is readily discernible, but it is in many important respects incomplete, and exhibits a very superficial knowledge of the nature, character, origin and use of the rock phosphate deposit and should never have formed the basis for any action by the department. It is worthy of note in this connection that the department particularly declined to have its decision in the "Lorine" case considered as a precedent. In his opinion (not reported), the Commissioner of the General Land Office states:

"In the introductory part of his brief, counsel for the entryman states that in the section of the country where these claims are situated there seems to exist a diversity of opinion among lawyers acting

for proposed locators as to whether the locations in this field should be as 'lode' or as 'placer' locations, from which it might be inferred that it was expected that the decision in the several mineral entries under consideration respecting whether they are lodes or placers would forever set at rest the chaotic state of affairs in this respect and make certain that all future phosphate locations in this territory must be made in conformity to the views herein expressed. It is not intended that this opinion shall have any such effect, and it could not have any such effect even if it were so intended. This opinion is designed to settle nothing but the matter involved in these entries, namely: whether they may be patented as lode mining claims under Section 2320 of the U. S. Revised Statutes relating to lode mining claims."

If the Land Department would not declare the "Lorine" lode decision, based on Sterling's report, to be binding as a determination of how calcium phosphate should be located, is it reasonable to suppose that its decision in the "Harry" lode case based on the same report is any more conclusive? The Harry lode decision can not affect appellee's right to the claims here in controversy; they can only be passed on when the matter of their patentability as placer comes regularly before the Department. The "Harry" lode decision is simply an adjudication upon an ex parte showing the same as the "Lorine" decision. In view of these conditions, appellee's right of possession of these claims must be deemed to be recognized by the Land Department exactly



to the same extent as its possession prior to patent of the "Waterloo" and "Windward" placers was recognized, and to the same extent as its possession of the "Layland" placer and of other claims, in northern Utah has been recognized by the issuance of final certificates of entry for said claims. None of the ground embraced within the claims here involved has been classified as non-placer by the Land Department. Appellee's possession must certainly be deemed valid and therefore a possession with which appellants had no right to interfere and in the face of which they could initiate no right, for, as stated in *Thallman vs. Thomas*, III Fed., 277-279, "A valid location of public land cannot be instituted while another has the possession and right of possession under an earlier lawful location."

See also *Clipper Mining Co. vs. Eli Mining Co.*,  
supra.

Appellee, up to the advent of appellants, had worked its claims as required by law, and as shown by the evidence, when appellee was temporarily absent, appellants attempted to establish themselves. This they could not do. In the words of Circuit Judge Ross:

"One who is in the actual possession of mining claim, working it for the mineral it contains and claiming it under laws of the United States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin, or temporarily absent from his claim."



Nevada Sierra Oil Co. vs. Home Oil Co., 93  
Fed., 673.

We call attention also to another decision by this court, viz: Cosmos Exploration Co. vs. Gray Eagle Oil Co., 112 Fed., 4, wherein the court held that land was not "vacant and open to settlement" when in the actual occupancy of others; that the fact of occupancy prevented the initiation of rights by other locators, and in the course of the opinion the court calls attention to a number of cases which in substance hold that locations are invalid when made by invasion of the actual possession of another.

In Kirk vs. Meldrum (Col.), 65 Pac., 634, it is said:

"Title to a mining claim cannot be initiated by an entry upon a prior, valid existing location. Moyle vs. Bullone, 7 Colo. App., 308, 44 Pac., 29. The fundamental principle governing the rights of parties to claims upon the public domain is that the bona fide occupant, for a purpose recognized by the law, is entitled to hold possession as against one subsequently attempting to initiate title to the same premises, unless the latter establishes a state of facts clearly demonstrating that the actual occupant is in possession without right."

In this case the record and the action of the Land Department clearly show that appellee was in rightful possession of the conflict area at the time appellant's lode locations were made and that the prior locations of appellee were such as had been respected by and such

as were entitled to the respect of, the Land Department.

Not only were appellants trespassers in attempting to locate their claims, but in face of appellee's protest proceeded with their discovery work. The following year, 1908, they were kept off the premises by appellee and thereupon obtained a temporary injunction to enable them to do assessment work. Appellee agreed that in consideration of the dismissal of the suit appellants might do their assessment work for *1908 only* (Rec., 170-175—not to remove any other mineral, however), and appellants, after obtaining permission to go upon the premises, remained thereon during the early part of 1909 and did the work for that year also in violation of the agreement (Rec., 169-175). In 1910 they again disregarded appellee's protest against their going upon the premises (Rec., 168). Appellants were not only trespassers in attempting to locate, but trespassers whenever they did work on the ground except for the year 1908. Under these conditions they could not initiate or acquire any rights.

There is an additional reason why appellants' lode locations were and are invalid, even assuming for the sake of argument that the phosphate deposit was subject to location as lode. It is this: Appellants' locations were not made peaceably.

#### *LODE LOCATION MUST BE MADE PEACEABLY.*

In speaking of lode within a placer, which presents a condition where the locators are not seeking to acquire the same deposit, and which, therefore, does not present so strong a case for the placer locator as under the con-

ditions in this case, Lindley in his work on Mining Law, says:

“Whosoever first discovers the lode may appropriate it by complying with the laws conferring privileges upon such discoverer. If he fails to do so it is open to the next comer; and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to *claim* it by appropriating it under the lode laws, it may be the subject of appropriation by others, the same as if it were upon the public domain; provided always, that such *appropriation is made and perfected peaceably and in good faith*. In this respect, the same rules of law which govern the locations of mineral land occupied or claimed by others under inchoate agricultural holdings, are to be applied.”

Lindley, Vol. 1, Sec. 413.

In discussing the question of the right of a person to go upon a homestead entry of another to locate mining claims, the same author states that such right exists, but adds:

“But there is another important principle which is also to be recognized. No rights under the public land laws can be initiated through a trespass. We do not think the law would sanction an invasion of a homestead claimant’s enclosure for the purpose of prospecting for minerals.”

Lindley, Vol. 1, Sec. 206.

See also

Clipper Mining Co. vs. Eli Mining Co., 194 U. S., 221; 48 Law Ed., 944.

Costigan, in his work on Mining Law, says:

“No trespass must be committed in making discovery and location, and the location must be made *peaceably* and perhaps not clandestinely.”

Costigan, p. 267.

The evidence shows that all the claims of the appellee, except the Wizard, were located during the months of June, July and August, 1904, and that the Wizard claim was located in December, 1905; that appellee and its predecessors in interest during each calendar year performed and made proof in due form of the required assessment work. These facts were all shown by the public records and by the workings upon the ground and were known to appellants.

Notwithstanding that discoveries had been made, corners established and notices posted on November 16th and 17th, 1907, as appears by the stipulation (Rec., 453), the lode locations were not completed until as to each claim, the affidavit required by Section 3216, Revised Codes of Idaho, 1909, had been made and attached to the copy of the notice of location and filed for record with the county recorder, and this was not done until the 17th day of January, 1908. The affidavit so required

of a locator is to the effect that the ground has not, to the best knowledge and belief of affiant, been located, or if so located, that the same has been abandoned or forfeited, and that the affiant has opened new ground to the extent or depth of ten (10) feet as required by the laws of the State of Idaho.

The Supreme Court of Idaho in the case of Van Buren vs. McKinley, 8 Ida., 93; 66 Pac., 936, has declared that such affidavit is essential to make a location valid. To quote:

“It is contended by counsel for appellant that an affidavit is not necessary to make a valid location; that the law requiring it imposes a condition precedent upon citizens about to locate mining ground not contemplated by the laws of the United States, and in conflict with them, and therefore the state law imposing such condition is absolutely void. Under the provisions of Section 2322, Rev. St., U. S., state, territory, and local regulations are authorized to be imposed as a condition precedent to the possession of mining claims, not in conflict with the laws of the United States. Requiring an affidavit to be attached to the location notice of a mining claim as provided by Section 3104, Rev. St., is not in conflict with the provisions of said Section 2322. It is a reasonable regulation that the legislature is fully authorized to make. Dunlap vs. Pattison (Idaho), 42 Pac., 504. The Supreme Court of Montana in several cases have held that the statute requiring an affidavit to a location notice of a mining claim was not in contravention of the federal stat-

utes. *McBurney vs. Berry*, 5 Pac., 867; *McCowan vs. McLay*, 40 Pac., 602; *Berg vs. Koegel*, 40 Pac., 605.”

See also:

*McBurney vs. Berry* (Mont.), 50 Pac., 867.

*McCowan vs. McLay* (Mont.), 40 Pac., 602.

*Kendall vs. San Juan Silver Mining Co.*, 144 U. S., 658; 36 L. Ed., 583.

On December 6, 1907, Colebath and Samson, employes of appellants, while prospecting, were ordered off the premises by Mr. Sullivan (Rec., 490, 491), and Mr. Duffield was ordered off when preparing to do assessment work on January 6, 1908. (Rec., 490, 492). These protests and objections of the appellee were, therefore, made long prior to the date when the lode locations were completed, to-wit: January 17, 1908 (see Complainants' Exhibits 2 to 12 inclusive and stipulation filed here February 20, 1913), the date when the affidavit required by the Idaho statutes was filed with the copies of the notices of location. In fact, these protests were made before the work of opening new ground referred to in said affidavit had been done. The evidence, therefore, shows without contradiction, that the locations were not made peaceably, but in the face of positive protests of the appellee made as soon as appellants were discovered upon the premises. In *San Francisco Chemical Co. vs. Duffield*, ....Fed., ....., the Circuit Court of Appeals was careful to suggest that “there is nothing to indicate that appellee’s entry upon



the premises in question was other than "peaceable," which is a condition altogether different from that shown by the record in this case.

## CONCLUSION.

Appellants' claim is, at most, based upon a technical contention. Notwithstanding appellee's locations were made and have been maintained in good faith, appellants would nevertheless exclude it from the property. How was appellee's predecessors to determine how phosphate should be located? Mr. Bell, who is a practical mining man, says he would be governed largely by the hand books on mining. (Rec., 784). These hand books, including that of Mr. Jack, one of appellants' counsel, classify phosphate as subject to location as placer; Morrison (14th Ed.), p. 243; and furthermore, the Land Department had likewise so classified it (18 L. Dec., 58). Mr. Bell further states that the ordinary prospector would not take this deposit from its physical appearance to be lode (Rec., 773, 774), and the proof is to the effect that Mr. Glenn of Montpelier and prospectors in the Teton country instead of taking it to be a lode formation, concluded that it was a coal bed. (Rec., 551-553, 774).

Although appellee, between the date of the location of its claims and the date when appellants attempted to make their locations, might at any time have located upon the deposit as lode, its belief that placer locations were proper was confirmed in 1906 by the issuance of the patent for the "Waterloo" and it, therefore, continued

in good faith to maintain its locations, and as before stated, the Land Department has since repeatedly justified appellee's course. Appellants are simply claim jumpers, seeking to take advantage of what they conceive to be an opportunity to acquire property which appellee as a bona fide locator has always possessed, and upon which it has expended thousands of dollars under the encouragement of the government.

Under the facts, the law and the equities, appellee was entitled to the award of right of possession and the decree appealed from should be affirmed.

Respectfully submitted,

CLARK & BUDGE,

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